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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 1479

CONSOLIDATION COAL COMPANY, Petitioner

v.

SOUTH-EAST COAL COMPANY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
AND
APPENDICES

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IN THE

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NO. .....

CONSOLIDATION COAL COMPANY, Petitioner

v.

SOUTH-EAST COAL COMPANY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Consolidation Coal Company, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered November 18, 1970, affirming a judgment of the United States District Court for the Eastern District of Kentucky, Richmond Division, holding Petitioner and a codefendant liable in damages to Respondent under Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2).

OPINIONS BELOW

The Opinion of the Sixth Circuit is reported at 434 F.2d 767, and is reprinted in Appendix A hereto, p. 2a. The unreported Memorandum of the District Court is reprinted in Appendix B hereto, p. 59a.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on November 18, 1970, at No. 19,622 therein, affirming the judgment of the United States District Court for the Eastern District of Kentucky, Richmond Division, against Petitioner and United Mine Workers of America in the sum of $7,566,356.00, with interest and costs.

On a timely application, Mr. Justice Stewart, by order dated January 26, 1971, ordered that the time for filing this petition for a Writ of Certiorari be extended to and including March 18, 1971.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Petitioner is informed that United Mine Workers of America — appellant in No. 19,623 in the Court of Appeals for the Sixth Circuit—is also filing a Petition for a Writ of Certiorari and has not therefore been made a party hereto.

QUESTIONS PRESENTED

1. Whether, in a case involving an alleged antitrust conspiracy between a union and a group of employers arising out of collective bargaining, the Learned Courts below acted in a way in conflict with applicable decisions of this Court when they disregarded the distinction between a forfeiture of exemption from the antitrust laws and a violation of those laws and also disregarded any separate consideration of the relevant antitrust issues, such as the rule of reason, and created a new *per se* antitrust violation?

2. Whether, in light of the applicable decisions of this Court requiring an agreement, or equivalent commitment, between a union and employer to impose labor standards on other bargaining units in order to justify antitrust liability, parallel conscious knowledge or "having in mind" may be considered by the jury as the equivalent of the requisite agreement or commitment either to constitute forfeiture of antitrust exemption or an antitrust violation?

3. Whether, in light of the applicable decisions of this Court, an admittedly legal collective bargaining agreement between a union and an employer can be the foundation for an antitrust violation if it is entered into with an anti-competitive intent or purpose?

4. Whether, in light of the applicable decisions of this Court, it was error, with respect to the "clear proof" rule, for the Court to instruct the jury in detail on the preponderance of evidence, and to make only passing reference to the "clear proof" rule and then to attempt to correct the error by later giving a disconnected and supplemental instruction on "clear proof" but without differentiating the preponderance of evidence rule from the "clear proof" rule and without differentiating the issues to which the two different standards of proof should apply?

5. Whether the District Court's handling of procedure and matters with respect to the impartiality of the jury, and its charge, and the approval of all thereof by the Court of Appeals, constituted such a departure from the accepted and usual course of judicial procedure as to call for this Court's supervision?

STATUTES

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890. c. 647, §1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

15 U.S.C. § 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

Statutes.

15 U.S.C. § 17. Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

29 U.S.C. §106. Responsibility of officers and members of associations or their organizations for unlawful acts of individual officers, members, and agents

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof. Mar. 23, 1932, c. 90, § 6, 47 Stat. 71.

STATEMENT OF THE CASE

This case began on April 26, 1966, when South-East Coal Company (hereafter "Respondent") filed a complaint against the United Mine Workers of America (hereafter "UMWA") and Consolidation Coal Company (hereafter "Petitioner") in the District Court for the Eastern District of Kentucky, Richmond Division (hereafter "District Court"). It claimed that UMWA and Petitioner, which acted through the agency of a multi-employer bargaining unit, Bituminous Coal Operators Association (hereafter "BCOA"), violated Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), causing damage to Respondent in the amount of $3,100,000.00, to be trebled to $9,300,000.00. Jurisdiction was based on the aforementioned sections of the Sherman Act and also Section 4 of the Clayton Act (15 U.S.C. § 15) (Jt. App. p. 7). There was a jury trial and verdict.

This is one of a group of cases[1] originating in the Sixth Circuit in which unsuccessful coal operators have claimed they were driven out of business by an alleged conspiracy between UMWA and BCOA. However, it is the first case which has come to judgment with a BCOA member, such as Petitioner, in the case.

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1. United Mine Workers v. Pennington, 381 U.S. 657 (1965); on remand, 400 F.2d 806 (6th Cir. 1968); *cert. denied,* 393 U.S. 983 (1968); Ramsey v. United Mine Workers, 265 F. Supp. 388 (E.D. Tenn. 1967); *affirmed by an equally divided Court,* 416 F.2d 655 (6th Cir. 1969); *reversed and remanded by Opinion of this Honorable Court,* 39 U.S.L.W. 4245 (1971); Tennessee Consolidated Coal Co. and Grundy, et al. v. United Mine Workers, 416 F.2d 1192 (6th Cir. 1969); *cert. denied,* 397 U.S. 964 (1970) (hereafter *Tennessee Consol* or *Consol*).

In the other cases, there were claims—and evidence —that there was a conspiracy to monopolize the TVA coal market, that UMWA had invested money in West Kentucky Coal Company which operated as a "fighting ship" to sell coal to TVA at predatorily low prices to drive the claimants out of that market, that UMWA by violence impeded or prevented claimants' operation in effectuation of the alleged conspiracy and that the claimants were so small that they could not mechanize fully to increase productivity and remain competitive.

Although the facts in the instant case relate to the alleged basic conspiracy, there was no evidence relating to the TVA market, West Kentucky Coal Company, or union violence. Moreover, Respondent was not a small operator. It is fully mechanized with sophisticated "continuous mining" machines and is classified by the United States Department of Labor in the No. 1—or largest—category of operating coal companies in the nation (Jt. App. pp. 536-37, 1138-39).[2] Here the Respondent's case grew out of and relied on the Protective Wage Clause (hereafter "PWC")[3] negotiated in 1958 as an amendment to the National Bituminous Coal Wage Agreement of 1950 (hereafter "NBCWA"). All agreements negotiated by UMWA since 1945 have been described as "National Agreements" (Jt. App. p. 1225).

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2. Herein, the indication, for example, "Jt. App. p. . . . ." refers to the Joint Appendix in the United States Court of Appeals for the Sixth Circuit, which has been certified to this Court. Reference to the Appendices attached to this Petition shall be referred to, for example, as "App. A p. . . . a." or "App. B p. . . . a." Page references in brackets in the Appendices hereto are to the Joint Appendix.

3. PWC is reprinted herein in Appendix E, p. 131a.

Statement of the Case.

The National Bituminous Coal Wage Agreement of 1950 ended a period of extreme labor strife in the coal industry which necessitated five seizures by the United States Government in order to preserve the supply of coal and created a threat of nationalization of the coal industry (Jt. App. pp. 986-87, 1481-82).

Respondent contended that paragraph A of PWC compelled, bound and "strait-jacketed" UMWA not to negotiate any agreement with any non-signatory on terms different than those contained in the 1958 amendment to the NBCWA—i.e., to impose the NBCWA terms on other bargaining units (Jt. App. pp. 1786-87). Respondent also contended that paragraph B of PWC bound and committed the operators not to purchase or handle, i.e., to "boycott", any coal not produced under the contract with UMWA (Jt. App. pp. 1786-87). That contention related to the fact that Petitioner had been the exclusive sales agent for Respondent since October of 1959 (Jt. App. p. 404). This was terminated by letter, dated December 30, 1961, by Respondent (Jt. App. pp. 434-35).

The jury's verdict came after a charge which disregarded the difference between a forfeiture of the labor exemption from the antitrust laws and a violation of those laws (App. C. pp. 93a-94a), which stated that the element of agreement or equivalent commitment requisite in this alleged antitrust conspiracy case could be satisfied by the parties "having in mind" that competitors could be harmed (App. C. p. 92a) that an admittedly legal agreement could be an antitrust violation if it were entered into with an anticompetitive intent or purpose (App. C. p. 91a), and which did not explain the difference between preponderance of evidence and "clear proof" or the issues to which each standard ap-

plies (App. C. pp. 82a-83a). The trial involved the creation of the atmosphere of a contest between the populace of eastern Kentucky on the one hand and UMWA and Petitioner on the other and certain events creating doubt as to the impartiality of the jury. The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. The Learned Courts below decided a federal question in a way in conflict with prior applicable decisions of this Court when they eliminated the distinction between forfeiture of the labor exemption from the antitrust laws and a violation of those laws, thus creating a new *per se* antitrust violation.

The Clayton Act (15 U.S.C. §17) has provided an exemption from the antitrust laws for legitimate labor activities — even though such activities constitute a Congressionally-sanctioned restriction on freedom of enterprise. Because it takes at least two to conspire, it should follow that the other party to the collective bargaining process may also claim the exemption or immunity. It would be unjust and impractical to permit any other conclusion.

Here, the District Court and the Court of Appeals completely ignored the employer's immunity correlative to that afforded labor unions. More significantly, those Courts also ignored the distinction between the question whether a labor union's activities take it outside the scope of the labor exemption from the antitrust laws and the different question, whether, once it is outside the scope of such exemption, there has been a violation of the antitrust laws.

Here, the Court of Appeals expressly equated a forfeiture of exemption from the antitrust laws with a violation of the antitrust laws when it said:

> "* * * when a labor union and an employer enter into a plan or scheme of the type which results in the union losing its exemption from liability under the antitrust law, that plan or scheme is by definition an unreasonable restraint under the antitrust laws." 434 F.2d at 755. (App. A p. 11a.)

That holding by the Court of Appeals is contrary to and in disregard of prior rulings by this Court in which the distinction between issues relating to exemption from the antitrust laws and a violation of the antitrust laws has been specifically recognized. *Meat Cutters Union v. Jewel Tea Co.,* 381 U.S. 676, 688-89 (1965); and *Apex Hosiery Co. v. Leader,* 310 U.S. 469 (1939).

In the *Apex Hosiery Co.* case, this Court stated as follows:

> "These cases show that activities of labor organizations not immunized by the Clayton Act are not necessarily violations of the Sherman Act." 310 U.S. at 512.

Mr. Justice White touched upon this at the oral argument in *Ramsey v. United Mine Workers* (hereafter *"Ramsey"*) on December 7, 1970. The distinction was specifically mentioned by Mr. Justice Douglas in his Dissenting Opinion in *Ramsey,* 39 U.S.L.W. at 4248. Because of the basis on which the majority of this Court reversed and remanded *Ramsey,* it was not necessary for those Justices who concurred in Mr. Justice White's Opinion to comment specifically on this point.

It is respectfully noted, however, that the language of this Court in the final sentence of the *Ramsey* majority opinion is open to some argument on this point:

> "Where a union, by agreement with one set of employers, insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, it is liable under the antitrust laws for the damages caused by its agreed upon conduct." 39 U.S.L.W. at 4248.

Immediately preceding the aforesaid quoted sentence, this Court repeated a holding in *United Mine Workers v. Pennington,* 381 U.S. 657 (1965) (hereafter *"Pennington")* that the alleged agreement "'. . . was not exempt from the antitrust laws'."

It is submitted that this Court did not mean to create a new *per se* violation when it said "* * * it is liable under the antitrust laws * * *". Rather, it is submitted, this Court meant "* * * it is *responsible* under the antitrust laws (i.e., not exempt) *if circumstances under those laws impose liability."*

If, under the decisions of this Court, the forfeiture of the antitrust exemption is not equivalent to the finding of an antitrust violation, then it is important that the District Court here never submitted to the jury any of the basic guidelines (e.g., the rule of reason)[4] to be utilized in determining whether or not an antitrust violation existed. Every agreement — legal or illegal — creates some restriction on economic freedom. Reasonableness, however, must be judged in the context of *all* the circumstances. *Appalachian Coals, Inc. v. United*

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4. Standard Oil Co. of New Jersey v. United States, 221 U.S. 31 (1911).

States, 288 U.S. 344 (1933); *Board of Trade v. United States,* 246 U.S. 231 (1918).

Apparently this threshold error also motivated the Court of Appeals to ignore the District Court's erroneous and prejudicial instructions with respect to monopoly and oligopoly — although there was no evidence of such in the case. (App. C pp. 85a-86a).

Actually, here the Court of Appeals did not even conclude unequivocally that proof sufficient to warrant a finding that UMWA had waived its exemption from liability under the antitrust laws constituted a *per se* violation of the antitrust laws. To the contrary, the Court of Appeals stated merely that this is "[t]he conclusion which *can* be drawn from this language . . .". (Emphasis added.) 434 F.2d at 775. (App. A p. 11a.)

Further evidence of the Court of Appeals' lack of conviction in its holding can also be found in its recognition of the fact that a contrary interpretation of Mr. Justice White's decision in *Pennington* was reached by Judge Peck of the Sixth Circuit in *Lewis v. Pennington,* 400 F.2d 806, 813-14 (1968), cert. denied, 393 U.S. 983 (1968) (hereafter *Second Pennington*), and also by District Judge Wilson in *Ramsey v. United Mine Workers,* 265 F. Supp. 388, 399 (1967).

The future of collective bargaining and the continuing effort to reconcile the national labor policies with the antitrust laws should not rest with the equivocal holding of the Court of Appeals in the instant case, especially when that holding is in conflict with prior decisions of this Honorable Court, a prior holding by the same Court of Appeals in a companion case (*Second Pennington*) and a holding of a District Court in another companion case (*Ramsey*).

If this Honorable Court did intend, in *Pennington* and *Ramsey,* to create a new *per se* violation, it is respectfully submitted that this should be done expressly and not *sub silentio,* or by implication.

2. The Learned Courts below decided a federal question in a way in conflict with prior applicable decisions of this Court when they permitted the jury to conclude that "having in mind" or having "conscious knowledge" that a legal agreement could harm a competitor was the equivalent of an actual agreement which would constitute a waiver of exemption and a violation of the antitrust laws.

Here, the District Court equated "having in mind" that harm could come to a competitor with an actual illegal anti-competitive agreement, and the Court of Appeals affirmed on the basis that "conscious knowledge" could be equated with an actual illegal anti-competitive agreement. Thus, the Courts below made "having in mind" or "conscious knowledge" of harm to a competitor the only requisite for forfeiture of the exemption and an antitrust violation.

It is believed error for the Courts below to have equated "having in mind" or "conscious knowledge" with agreement at all, and it is greater error to apply it to both the forfeiture and violation aspects of the case.

In that connection, the District Court said:

> *"The thing which you will have to decide and which I will probably refer to again, there is nothing unlawful about that contract in itself;* but if it was entered into with the intention on the part of the signatories—the two defendants here—to

injure the plaintiff, *if they had that in mind,* that 'we are going to go into this contract because we know it will put South-East out of business; they can't meet the conditions; we are too big, too strong, and they cannot compete with us, cannot get miners to work for them, and they cannot sell their coal on the market because they do not have sufficient sales agency, so we will deliberately enter into this and they can't meet it; we will thereby profit by putting competitors out of business or seriously hampering his operation.'

"So, the issue is: *Did these two signatories have that thing of putting the South-East Coal Company out of business in mind, the time they signed the contract?*"[5] (Emphasis added.) (App. C. p. 92a).

This error was ratified and confirmed by the Circuit Court when it said:

"Third, if however the employers and union entered into this contract with the *conscious knowledge* or intent that it would be used to drive competitors out of business * * *, then a violation of the antitrust laws has occurred." (Emphasis added). 434 F.2d at 782. (App. A. p. 27a).

It would be unrealistic not to recognize that every employer knows, to some extent, that some of his com-

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5. Respondent was a signatory to collective bargaining agreements with UMWA until January of 1962, when Respondent cancelled its agreement (Jt. App. p. 436). A question of interest posed by these facts and the District Court's instructions are how UMWA and this Petitioner could have had "in mind" putting Respondent out of business in December of 1958, *at the time when* the collective bargaining agreement containing PWC was executed (Jt. App. p. 1922).

petitors will be affected—perhaps adversely—if they cannot meet the standards of a labor contract which it has entered, if such employer is the "first target" of the union's negotiating demands. In footnote 2 of *Pennington,* 381 U.S. at 665, this Court recognized that a union might legally adopt and implement a uniform wage policy, even though it might "suspect that some employers cannot effectively compete if they are required to pay the wage scale demanded by the union." Whether this Court desires to equate "suspicion" with "having in mind" as set forth by the District Court here or with "conscious knowledge" as set forth by the Court of Appeals and whether any of those concepts are to be considered the equivalent of a conspiracy to violate the antitrust laws are important matters to be considered by this Court.

The clear ruling to be drawn from *Pennington* and *Ramsey* is that a forfeiture of the exemption from the antitrust laws occurs if there is an express or implicit *agreement* (or equivalent commitment) by the union and coal operator employers, whereby the union agrees to impose certain labor standards upon other bargaining units. This Court's observation (381 U.S. at 668) concerning the necessity of a union's preserving its freedom to bargain makes it clear that this result is based on the fact that the union—as a consequence of such an agreement — loses its ability to change the otherwise *unilateral* policy of uniformity in its bargaining for other units.

Accordingly, it seems beyond question that the trier of facts must, preliminarily, determine whether there was an *agreement* (or equivalent commitment) by the union to impose certain labor standards

on other bargaining units. Where, as was determined and stated by the Lower Courts in this case, the *collective bargaining agreement is legal*, the trier of facts should be required to determine whether some other agreement or equivalent concert of action, either express or implied, existed.

Here the District Court did not instruct the jury to determine whether some other agreement (or equivalent commitment) existed, nor did it instruct them that such agreement (or equivalent commitment) must bind the union to impose certain labor standards on other bargaining units. To the contrary, it permitted the jury to infer an illegal anticompetitive agreement from the *legal* agreement (i.e., PWC) if the parties had "in mind" that it would have anticompetitive effects on respondent, and, as noted, the Court of Appeals affirmed on the basis of "conscious knowledge".

Traditional conspiracy considerations usually necessitate a finding of an agreement or concert of action or circumstances sufficient to justify an inference of agreement. Consciously parallel action alone will not, under the decisions of this Court, furnish the requisite proof of conspiratorial action.

In *Theater Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1953), it was stated that:

> ". . . this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but

> *"conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely."* [Footnote omitted.] (Emphasis added.)

The decisions of the District Court and Court of Appeals in this case would appear to be in clear conflict with that decision of this Honorable Court.

It appears that the principles enunciated by this Court in *Theater Enterprises* are being eroded by Circuit Courts—including the Sixth Circuit here—and there is actually a conflict among the circuits on this point.

The Eighth Circuit, in *Pevely Dairy Co. v. United States,* 178 F.2d 363 (1949), cert. denied, 339 U.S. 942 (1950), held that a finding of conspiracy based on circumstantial evidence will not stand unless the finding is wholly consistent with guilt and totally inconsistent with innocence.[6] In *Morton Salt Co. v. United States,* 235 F.2d 573 (1956), the Tenth Circuit refused to adopt this standard. The Ninth Circuit also rejected the *Pevely* holding in *C-O-Two Fire Equipment Co. v. United States,* 197 F.2d 489, 494 (1952), where it is stated:

> "We are not unmindful of the standard suggested in Pevely Dairy Co. v. United States, 8 Cir., 178 F.2d 363, 367, upon which appellants lay great stress . . . . But that is not to say, as appellants would have us do, that such a rule must be separately applied to each link in the chain of circumstances and if one such unit does not fit the standard then the whole is likewise vulnerable."

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6. Coca-Cola Bottling Co. of Black Hills v. Hubbard, 203 F.2d 859, 861 (8th Cir. 1953) overruled *Pevely* only to the extent that it held that ". . . since no exceptions were made to the instructions of the Court, they became the law of the case for determining the sufficiency of the evidence. . . ."

Under the Court of Appeals' decision here, if an employer, having in mind that a union has such well established and traditional policies of seeking industry-wide labor standards, is the first unit to bargain with the union and knows that what he does will set a standard for the industry and that some of his competitors cannot meet the standard, then the test of an antitrust violation will have been met, and a jury can find an antitrust violation.

Accordingly, the grant of certiorari is merited to redefine the principle and to resolve that conflict.

3. The Learned Courts below decided a federal question in a way in conflict with applicable decisions of this Court when they departed from the rulings of this Court in holding that an admittedly legal agreement could be the foundation for an antitrust violation if it was merely entered into with an anticompetitive intent.

Another question is vital here with respect to the element of "agreement" (or equivalent commitment) mentioned by Mr. Justice White in *Ramsey*. As pointed out above, the trial here was conducted by Respondent's counsel on the basis that PWC constituted a "straitjacket/boycott" agreement between UMWA and BCOA, acting as bargaining agent for Petitioner.

In the instant case, the District Court found and stated to the jury that PWC was legal but nevertheless permitted the jury to conclude that the legal agreement could constitute an antitrust violation if it were entered into with the *intent* that it should have an adverse effect upon a competitor.[7]

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7. In *Tennessee Consol,* the District Court charged the jury with respect to the manner of interpreting the

That course of action was ratified and confirmed by the Court of Appeals.

This brings into question the relationship of the actions of the Lower Courts here to the *Noerr*[8] and *Pennington* cases. It is submitted that those cases stand for the proposition that if an action is legal, then an anticompetitive intent or purpose will not make it illegal. In *Pennington,* this Court reversed the same Court of Appeals which had held that illegal purpose or intent could vitiate conduct which would otherwise be legal.

The *Noerr* and *Pennington* doctrines are salutary. To hold that every legal action is subject to the *ex post facto* veto of a jury if that jury concludes that such admittedly legal action was taken for an illegal purpose or intent could mean that every legal act could be the springboard for a foray into psychological investigation by laymen. There would never be any assurance that legal action is really legal.

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clause, and the jury clearly found that the clause was properly interpreted as a "strait-jacket/boycott" agreement. Such was not the case here, and this Court's denial of certiorari in *Tennessee Consol* does not, therefore, dictate a similar result here.

In *Ramsey,* the District Court and the Court of Appeals—responding to an allegation that PWC was a *per se* antitrust violation—concluded that the clause was capable of two opposite constructions and that the proper interpretation to be given it was one that did not result in a violation of law. A similar result was reached by the same Court of Appeals in *Second Pennington.*

In *Ramsey,* this Court declined to consider a further argument by petitioner with respect to the interpretation of PWC. Presumably that question will be reconsidered by the Court below on remand.

8. Eastern R.R. Conference v. Noerr Motors, 365 U. S. 127 (1961).

This is especially true in cases such as the present one. The paradox is highlighted here by the Court of Appeals' reliance upon the alleged fact that Petitioner discontinued handling Respondent's coal under PWC as evidence of the illegality of PWC (App. A p. 43a). Yet that was a consequence flowing from the admittedly legal provision—i.e., paragraph B of PWC.

If the decisions of this Court in *Noerr* and *Pennington* are to remain unchallenged, it is essential to determine whether and to what extent the Court of Appeals' decision in this case and the action of the Trial Court erode that rule of law. It is additionally significant that two cases, in the First and Ninth Circuits, seem to conflict with the *Noerr-Pennington* doctrine. *Whitten v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 39 U.S.L.W. 3149 (1971); *Trucking Unlimited v. California Motor Transport Co.*, 432 F.2d 755 (9th Cir. 1970).

4. The Learned Courts below decided a federal question in a way in conflict with applicable decisions of this Court when they erred with respect to the proper application of the "clear proof" rule recently discussed by this Court in *Ramsey*.

This Court's decision in *Ramsey* requires a determination whether the District Court and the Court of Appeals here properly applied the correct standard of proof.

Here the Court of Appeals said:

> "There is no basis in either the Sherman Act or the Norris-LaGuardia Act to indicate that to impose liability on a company named as a coconspirator

of a labor union for an antitrust violation, anything more than a preponderance of the evidence is necessary." 434 F.2d at 773. (App. A p. 7a).

In *Ramsey,* this Court decided that Section 6 of the Norris-LaGuardia Act (29 U.S.C. §106) requires clear and convincing evidence as to the authorization, participation in, or ratification of the acts allegedly performed. This Court also held that the aforementioned "clear proof" rule applies both to employee and employer organizations. 39 U.S.L.W. at 4247 note 8.

Here all parties requested a jury instruction on the clear proof rule. The District Court gave none but instructed in detail on the preponderance of evidence and made only passing reference to the clear proof rule. (App. C p. 83a). When attention was called to the matter, the District Court attempted to correct the error by later giving a disconnected and supplemental instruction on clear proof. (App. C pp. 102a-03a) However, the Court never instructed that the clear proof rule was different from the preponderance of the evidence rule that had been previously given in detail and never differentiated between issues involving substantive antitrust violations and issues with respect to authorization, participation in, or ratification of acts.

Here, the District Court's failure to instruct properly is greatly similar to the instructions condemned by this Court in *United Mine Workers v. Gibbs,* 383 U.S. 715, 737 note 29 (1966), where this Court noted that the possibility was strong that ". . . the jury either did not understand the phrase [clear proof] or completely overlooked it in the context of the lengthy charge given." Here the likelihood—if not certainty—of confusion is even greater.

This error is important here because there are agency issues in this case — particularly from the Petitioner's point of view.

Whatever may have been true in other cases of this nature where only UMWA was the defendant, it was here contended that the alleged conspiracy was effectuated by BCOA, a multi-employer bargaining unit, which allegedly acted as agent for Petitioner.

Throughout the case, objections were made and issues raised with respect to the authority of BCOA personnel to speak for that association or for the Petitioner and objections were made with respect to the authority of various persons to speak for UMWA. (Jt. App. pp. 743, 747, 756, 763, 771, 772, 773). BCOA records demonstrate (Jt. App. pp. 861-62) there was no authority to enter into an illegal antitrust conspiracy.

Under *Ramsey,* application of the clear proof rule to such issues is a matter of fundamental law, both as to UMWA and Petitioner.

The foregoing demonstrates that the District Court and the Court of Appeals contravened a rule of law laid down by this Court in failing to recognize that the "clear proof" rule applied to Petitioner—as well as UMWA—and also in failing to apply said clear proof rule to essential issues in this case.

5. The District Court's handling of procedure and matters with respect to the impartiality of the jury, and its charge, and the approval of all thereof by the Court of Appeals, constituted such a departure from the accepted and usual course of judicial procedures as to call for the exercise of this Court's supervision.

Procedurally, this case was tried throughout as though it were a contest between the populace of eastern Kentucky on one hand and UMWA and Petitioner on the other (Jt. App. pp. 887, 1633-34, 1775, 1804-05, 1824-26, 1839-40, 1844). This contravened the rule in *New York Central Railroad v. Johnson,* 279 U.S. 31[0], 319 (1929), where the creation, at trial, of a hostile atmosphere towards a corporate party from another section of the country was roundly condemned.

Significantly, from the procedural point of view, although the District Court refused Petitioner's requested instruction as to hearsay evidence in this alleged conspiracy case (Jt. App. pp. 1759-60), the *very same instructions,* word for word (including the *there* inapplicable "clear proof" rule), were given in the very next case[9] tried by the same District Court — also an alleged antitrust conspiracy (App. D p. 111a).

The District Court also refused to instruct the jury as to the "equal hypothesis" rule (Jt. App. pp. 1760-61), the importance of which has been the subject of this Court's teaching: *Pennsylvania R. R. Co. v. Chamberlain,* 288 U.S. 333 (1933). The Court of Appeals affirmed on the point. Again significantly, although the District Judge refused to give the "equal hypothesis" charge in this case, he gave a detailed and explicit "equal hypothesis" charge in the very next case he tried (See footnote 9, *supra*) (App. D pp. 111a-12a).

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9. Case No. 1800, styled Arnold G. Pessin and Rex C. Ellsworth v. Keeneland Association, University of Kentucky Research Foundation and the Bank of New York. (Portions of the instructions in that case were incorporated into the Joint Appendix filed in the Court of Appeal and reprinted herein in Appendix D p. 105a).

This rule is more than a negative way of stating that a plaintiff must sustain the burden of proof. Burden of proof relates to *all* the evidence. This rule guides the trier of fact in the determination of the weight of a particular inference to be accorded a *particular* item of evidence.

In *Ramsey,* the District Judge — sitting without a jury — applied the rule in considering the evidence. If a District Judge, sitting as a trier of fact, properly uses the rule, *a fortiori,* a jury should be instructed as to its use where it is the trier of fact. Significantly, the jury was instructed with respect to this rule in *Tennessee Consol.*

Procedurally, the District Court here denied motions for a directed verdict and motions for judgment n.o.v. because it believed that the decision of this Court in *Pennington* required the same. However, in *Pennington* (381 U.S. at 663) this Court relied upon the contention of a collusive bidding arrangement to drive the plaintiff from the "TVA spot market" as a basis for the denial of such motions. There was no such evidence here.

The last sentence in Footnote 2 of the same opinion (381 U.S. at 665) constituted an express statement that this Court in *Pennington* indicated no opinion as to the sufficiency of the other evidence.

Voir dire examination revealed that one juror had longstanding business relations with a son of one of Respondent's officers and stockholders (Jt. App. pp. 321-25). A challenge for cause was denied (Jt. App. p. 325). Later it was discovered that this same juror discussed the case with an attorney who had represented

Respondent and who was involved in antitrust litigation for a coal company (Jt. App. pp. 238-45). A post-trial motion to subpoena the juror for interrogation was denied (Jt. App. p. 244).

Also, during the trial, the Respondent's president engaged in conversation with two jurors in a hotel dining room, though other seats were available, and the District Court refused a mistrial on the ground that the Respondent's president ". . . didn't do anything intentionally" (Jt. App. pp. 1033-38).

The Lower Court's handling of these matters and the Court of Appeals' approval violated the precepts of this Court (*Mattox v. United States,* 146 U.S. 140 (1892); *Tumey v. Ohio,* 273 U.S. 510 (1926); *Coatings Corp. v. Continental Cas. Co.,* 393 U.S. 145 (1968)) that jurors and others who sit in judgment on the rights of parties must be free from external influences and must be completely impartial. Justice must not only be fair, but there must be the assurance of fairness by the complete exclusion of questionable influences.

A perusal of the charge by this Court (App. C pp. 69a-104a) is respectfully and urgently requested. That charge was inadequate, misleading, confusing and prejudicial. It is believed that a reading of the charge leads to the conclusion that in this complex case relating to the interplay between two basic national policies, none of the fundamental issues were delineated to the jury. The charge, both as a whole and in its individual parts, constituted fundamental error, making impossible the proper administration of justice in this case and meriting the supervision of this Court.

CONCLUSION

For the foregoing reasons this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19,622
SOUTH-EAST COAL COMPANY,
Plaintiff-Appellee,
v.
CONSOLIDATION COAL COMPANY,
Defendant-Appellant.

No. 19,623
SOUTH-EAST COAL COMPANY,
Plaintiff-Appellee,
v.
UNITED MINE WORKERS OF AMERICA,
Defendant-Appellant.

Appeals from the United States District Court for the Eastern District of Kentucky.

Opinion

Decided and Filed November 18, 1970.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and BROOKS, Circuit Judges.

BROOKS, Circuit Judge. These are appeals by defendants-appellants, United Mine Workers of America (UMW or Union) and Consolidation Coal Company (Consol or Consolidation),[1] from a jury verdict imposing civil liability for alleged violation of Sections 1 and

1. In this action, unlike the situation which existed in *Ramsey v. United Mine Workers of America*, 416 F.2d 655 (6th Cir. 1969), a coal company which allegedly conspired with the Union to restrain trade was made a codefendant.

2 of the Sherman Anti-Trust Act (15 U.S.C. §§ 1 and 2). Plaintiff, South-East Coal Company (South-East), contended that a conspiracy to restrain trade existed between UMW, Consol and other large coal companies and the Bituminous Coal Operators Association (BCOA) which was designed to force South-East and other small coal producers in Eastern Kentucky out of the bituminous coal business. After a trial lasting six weeks, the jury returned a verdict for plaintiff, South-East Coal Company, in the amount of $2,410,452. This amount was tripled ($7,231,356) as required by 15 U.S.C. § 15, and attorneys' fees of $335,000 were allowed, bringing the total judgment to $7,566,356. We affirm.

On numerous occasions this Court has considered similar alleged conspiracies between the UMW and large bituminous coal producers and for a general explanation and description of the nature of the contended conspiracy in this case, the following cases are particularly illuminating. *United Mine Workers v. Pennington,* 381 U.S. 657 at 664 (1965); *Tennessee Consolidated Coal Company v. United Mine Workers,* 416 F.2d 1192 at 1193 (6th Cir. 1969); *Ramsey v. United Mine Workers,* 265 F. Supp. 388 at 392, 393 (E.D. Tenn. 1967); *Pennington v. United Mine Workers,* 325 F.2d 804 at 807 (6th Cir. 1963).

While recognizing that the present case is factually distinguishable from the cited cases[2] and that differing proof was employed by the plaintiff, South-East, in at-

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2. A notable difference is that, unlike in the cases cited above, there is in the present case no contention made that the alleged conspiracy attempted to affect or manipulate coal prices in the T.W.A. [sic.] bituminous coal market.

tempting to establish the existence of this conspiracy, this opinion would, however, be unduly lengthened by an elaborate discussion of plaintiff's case and proof. Therefore, the specific and unique facts involved in this case which bear on issues raised on this appeal will be considered in conjunction with those issues. Both appellants have taken issue with certain conduct at trial which allegedly prejudiced them jointly, and these issues will be consolidated for consideration. Issues raised by appellants which explore alleged errors having only singular significance will be dealt with individually.

I. ALLEGED ERRORS IN INSTRUCTIONS

A. THE STANDARD OF PROOF REQUIRED TO IMPOSE LIABILITY

Consol and the Union argue that the District Court erred in its charge to the jury on the necessary degree or standard of proof which plaintiff must meet in order for the jury to conclude that appellants violated the Sherman Act. The Union, relying upon *Lewis v. Pennington,* 400 F.2d 806 (6th Cir.. 1968)[3] and *Ramsey v.*

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3. The *Lewis v. Pennington* case has a rather involved history. This Court first affirmed the District Court holding against UMW in *Pennington v. UMW*, 325 F.2d 804 (6th Cir. 1963). The Supreme Court agreed that the Union's exemption from the antitrust laws did not apply in this situation but reversed on other grounds. *Pennington v. UMW,* 381 U.S. 657 (1965). On retrial in *Lewis v. Pennington,* 257 F.Supp. 815 (1966), the District Court found in favor of the Union reasoning that plaintiff failed to demonstrate by "clear proof" any violation of the antitrust laws. This Court in *Lewis v. Pennington,* 400 F.2d 806 (6th Cir. 1968) affirmed the District Court. (Before Judges Edwards, Peck and Combs, per J. Edwards). Certiorari was denied by the Supreme Court in 393 U. S. 983 (1968).

United Mine Workers, 416 F.2d 655 (6th Cir. 1969),[4] contends that the District Court did not adequately or accurately instruct the jury that to impose liability on

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4. In *Ramsey v. UMW* this Court sat en banc. This was an appeal from the District Court ruling dismissing the action, 265 F.Supp. 388 (1967), because plaintiffs could not show an antitrust violation on the part of the Union by "clear proof", although by the ordinary standard of preponderance of the evidence the Court suggested that liability might be imposed upon the Union. A three-judge panel of this Court heard this appeal on April 8, 1969. Rehearing en banc was granted and that opinion appears at 416 F.2d 655 (6th Cir. 1969), Chief Judge Phillips and Judges Edwards, Peck and Combs for affirming; opinion by Judge Edwards. Judges Weick, O'Sullivan, Celebrezze and McCree for reversing; opinion by Judge O'Sullivan. Certiorari was granted by the Supreme Court, — U.S. — (March .., 1970).

One week before the en banc hearing in *Ramsey,* a panel composed of Judges Weick, Peck and Combs (opinion by Judge Weick) in *Tennessee Consolidated Coal Company v. UMW*, 416 F.2d 1192 (1969) affirmed the jury finding of liability of the union for an antitrust violation. (The West Kentucky Coal Company which was joined as a defendant because it was an alleged co-conspirator of the union was voluntarily non-suited. Thus, here again, we had only the union being sued.) This Court observed regarding the District Court's instructions that the Union was given the benefit of a more stringent standard of proof by the fashion in which the District Court instructed the jury on "clear proof" and, therefore, was not prejudiced by the instructions even if they were incorrect. The Court made the following remark respecting Section 6 of the Norris-LaGuardia Act: "Section 6 does provide that participation, authorization or ratification must be shown by clear proof. Section 6 does not state that the unlawful acts must be shown by clear proof." Judges Peck and Combs were among the judges in the divided court in *Ramsey, supra,* which there held that all elements of the antitrust vio-

the Union every essential element of the violation, except damages, must be established by "clear proof".[5] Consol joins in and maintains that it too should get the benefit of this more stringent standard of proof. This Circuit is somewhat in disagreement as to the proper degree of proof required to hold a labor union liable for violating the Sherman Act. In the en banc hearing in

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lation except damages must be shown by clear proof. Judge Weick, author of the opinion in *Tennessee Consolidated Coal,* joined those judges in *Ramsey* who felt that only the authorization, participation, or ratification by the Union of the unlawful acts need be shown by clear proof. Certiorari in *Tennessee Consolidated Coal* was denied by the Supreme Court, 38 U.S.L.W. 3335, 3342 (March 3, 1970).

5. The District Court gave an instruction on proof by a preponderance of the evidence, see *infra* p. 14. However, in its supplemental instructions to the jury, the Court gave the following charge on "clear proof":

> "Members of the jury, the Court has already charged you that the issue of alleged conspiracy in this case must be decided upon clear proof, that is, the plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal, and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof. I want to give you that additional instruction as a definition for one of the terms I used in my charge."

Thus, the District Court did charge the jury that "clear proof" of participation, authorization or ratification of the alleged conspiracy by the defendants was necessary to hold them liable. While it is concluded that the "clear proof" standard is applicable only in holding a union ratified or authorized the acts of its officials, the District Court's instruction even if erroneous gave both defendants the benefit of a more stringent burden of proof for finding them liable.

Ramsey v. United Mine Workers, supra, the Court divided evenly on the issue. Four judges held that to impose liability on a labor union for a Sherman Act violation Section 6 of the Norris-LaGuardia Act[6] requires that every element of the unlawful act except damages be shown by "clear proof". Four judges construed this section of the Norris-LaGuardia Act to provide that the "clear proof" standard applied only in proving that the Union participated in, authorized or ratified the unlawful acts of its officers with actual knowledge. They concluded that after this was shown by "clear proof" the remaining elements of the antitrust violation—formation of the antitrust conspiracy, the unlawful acts, causation and damages, and all the other elements — required proof only by a preponderance of the evidence.

Because a major coal company has been named a defendant as a coconspirator with the UMW in this antitrust case, a unique problem is presented with respect to the standard of proof question. That problem is what standard of proof must be met by the plaintiff to hold a company liable for an antitrust violation if it conspired with a labor union. If it is assumed that

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6. Section 6 of the Act (29 U.S.C. § 106) provides:

> "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

the correct standard of proof to be applied in holding a labor union civilly liable for a Sherman Act violation is "clear proof" of all essential elements, the question then is: "Should a company which is fortuitously joined as a coconspirator of a labor union in an antitrust case get the benefit of the stricter standard of proof afforded the union?" There is no basis in either the Sherman Act or the Norris-LaGuardia Act to indicate that to impose liability on a company, named as a coconspirator of a labor union for an antitrust violation, anything more than a preponderance of the evidence is necessary. To hold that a company should get the benefit of this more strict standard, simply because it was named with a labor union as a coconspirator in a scheme to restrain trade, would be to grant such a company a more advantageous position than other companies would have, which might violate the antitrust laws but are not joined with a union. The law does not provide such an arbitrary advantage. The standard of proof applicable to a company in attempting to show it violated the antitrust laws, regardless of whether it is joined as a coconspirator with a labor union, is the preponderance of the evidence. *Bigelow v. RKO Pictures,* 150 F.2d 877, 883 (7th Cir. 1945); reversed on other grounds, 327 U.S. 251 (1946).

Having concluded that the standard of proof needed to be met to hold a company civilly for an antitrust violation is preponderance of the evidence, another legal hurdle is encountered when, as in this case, a company is joined as a coconspirator with a union. Again, assume that the correct standard of proof applicable to a labor union under these circum-

stances is "clear proof". Hypothetically, a situation could exist where only a union and a single company have conspired to restrain trade. Suppose that in this hypothetical case it could be shown by a preponderance of the evidence that the company did conspire to violate the antitrust laws, however, while a preponderance of the evidence also showed the union conspired, it could not be shown by "clear proof". Therefore, the union would be exonerated and, by force of the fact that a Sherman Act violation is an actionable wrong only when committed under an unlawful conspiracy by two or more, the company would also escape liability. *United States v. Socony-Vacuum Oil Company,* 310 U.S. 150 (1940); *Standard Oil Company of California v. Moore,* 251 F.2d 188 (9th Cir. 1957), cert. denied, 356 U.S. 975. Thus, the company by indirect method would have received the benefit of the more strict standard of proof. While the chances of a situation as this occurring are perhaps remote, this explains the type of problem which may result when parties to an actionable wrong like conspiracy have their respective ultimate liabilities gauged by different standards of proof.

This leads to the question of whether all essential elements of an alleged antitrust conspiracy against a labor union must be shown by "clear proof". The en banc decision of this Court in *Ramsey* did not resolve this controversy. Without a repetitive discussion of the rationale behind this panel's conclusion on this issue, already extensively explored in Judge O'Sullivan's opinion in *Ramsey,* it is concluded that while "clear proof" is necessary to show that the Union participated, authorized, or ratified the acts of its officers, the

essential elements of the conspiracy necessary to resolve the ultimate issue of liability need be shown only by a preponderance of the evidence. (See n. 4). The jury charge on the standard of proof issue could have been more clear, however, the parties were given the benefit of a partial instruction which was more stringent than required by this Court's conclusion on what is the proper standard of proof.[7] Thus, the parties were not prejudiced by the instruction even if it was erroneous.

B. THE REASONABLENESS OF THE RESTRAINT

UMW and Consol claim they were prejudiced by the absence of an instruction to the jury that only undue or unreasonable restraints of trade or competition are grounds for finding a Sherman Act violation. Usually, to find that a violation of the Sherman Act has occurred, the restraint of trade or competition resulting from certain acts committed by the accused parties must be "unreasonable". See generally, *Standard Oil Company v. United States,* 221 U.S. 1 (1911); *Apex Hosiery Company v. Leader,* 310 U.S. 469 (1940); *Lewis v. Pennington, supra.* However, there are several types of restraints of trade which are per se unreasable. See e.g., *United States v. Trenton Potteries Company,* 273 U.S. 392 (1927); *United States v. Socony-Vacuum Oil Company, Inc., supra; United States v. Consolidated Laundries Corporation,* 291 F.2d 563 (2nd Cir. 1961). Other restraints, while reasonable on their face, become unreasonable when they are accompanied with a specific intent to accomplish a forbidden

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7. See n. 5, supra.

restraint. *United States v. Columbia Steel Company,* 334 U.S. 492 (1948).

In *United Mine Workers v. Pennington, supra,* an alleged conspiracy existed which had as part of its purpose the identical objective that plaintiff, South-East, contends was the object of this particular conspiracy. That is, that the "union entered into a conspiracy with the large operators to impose the agreed-upon wages and royalty scales upon the smaller, non-union operators, regardless of their ability to pay and regardless of whether or not the union represented the employees of these companies, all for the purpose of eliminating them from the industry, limiting production and preempting the market for the large unionized operators." Respecting this type of conspiracy the Supreme Court observed at 381 U.S. 665, 666:

> "[A] union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such union behavior (Footnote omitted). But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy."

The Supreme Court then made the following analogy:

> "One could hardly contend, for example, that one group of employers could lawfully demand that the

union impose on other employers wages that were significantly higher than those paid by the requesting employers, or a system of computing wages that, because of differences in methods of production, would be more costly to one set of employers than to another. The anticompetitive potential of such a combination is obvious, but is little more severe than what is alleged to have been the purpose and effect of the conspiracy in this case to establish wages at a level that marginal producers could not pay so that they would be driven from the industry." 381 U.S. at 668.

The conclusion which can be drawn from this language is that when a labor union and an employer enter into a plan or scheme of the type which results in the union losing its exemption from liability under the antitrust law, that plan or scheme is by definition an unreasonable restraint under the antitrust laws. [But see the interpretation given this language by Judge Peck in *Lewis v. Pennington,* 400 F.2d 806, 813-814 (1968) and by District Judge Wilson in *Ramsey v. United Mine Workers,* 265 F.Supp. 388, 399 (1967)]. Thus, if it could be shown that in this case the Union entered into a conspiracy with certain large coal operators to impose agreed upon wages and royalties upon smaller, nonunion coal producers, regardless of their ability to pay and regardless of whether or not the Union represented the employees of these smaller companies, all for the avowed purpose of eliminating them from the business, limiting production and pre-empting the market for the larger, unionized coal producers, this conspiracy would be a per se unreasonable restraint of trade or competition. While the District Court did not give an instruc-

tion that only undue or unreasonable restraints of trade or competition can be grounds for a jury to conclude that there was an antitrust violation, in light of the conclusion that if the alleged conspiracy in this case was proved, it would be by definition unreasonable, no specific instruction on the reasonableness of the restraint was necessary.

C. INSTRUCTIONS ON A LABOR UNION'S EXEMPTION FROM THE ANTITRUST LAWS

The United Mine Workers argue that they were prejudiced by the District Court's failure to give its proffered instruction on a labor union's exemption from the antitrust laws.[8] The District Court gave the following instructions respecting activities of a labor union and their relationship to the antitrust laws:

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8 The Union proffered the following instruction:

"3. In Section 6 of the Clayton Act, which amended the Sherman Antitrust Act, Congress declared that 'the labor of a human being is not a commodity or article of commerce nor shall (labor) organizations or the members thereof be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws.' The entering into a wage agreement with employers, which is a successful union activity, may have some influence on price competition by eliminating that part of such competition which is based on differences in labor standards. However, a labor union to be effective must eliminate the competition from goods produced under sub-standard labor conditions. The elimination of price competition based on differences in labor standards is a lawful union objective and the effect of such objective on price competition is not violative of the antitrust laws. *Apex Hosiery Co. v. Leader,* 310 U.S. 469, 503; *UMWA v. Pennington,* 381 U.S. 657, 664."

"Now, the law does not make it unlawful for them to combine for the purpose of making a union for the purpose of protecting their rights and for having a bargaining agent, so you are not to consider because the union is composed of a great many miners, all of the miners in this Eastern Kentucky who are members of it, that of itself is not unlawful. The courts have expressly said so.

"The law has expressly said so in what is known as the LaGuardia Act that was passed by the Congress. That is not unlawful."

* * *

"Then under the national law and under the national policy, the labor laws, as we have produced under what is known as the Labor Act, and the LaGuardia Act and these other Acts of Congress, they were allowed to bargain collectively. They didn't hire one man for so much and another for so much, but the miners and other workers in other industries were allowed to bargain collectively and to select a bargaining agent."

* * *

"A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own union's interest, seek to obtain the same terms from other employers; but a union forfeits its exemption from the anti-trust laws when it is clearly shown that it has an agreement with one set of employers to impose a wage scale on the bargaining unit."[9]

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9. The correct statement per *Pennington* is "a certain wage scale on other bargaining units." Apparently,

"One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it becomes a party to the conspiracy.

"This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment for the remaining employees and employer in the industry.

"It is a legitimate aim of any national labor organization to obtain uniformity of labor standards, and it may be a consequence of such union activity to eliminate competition based on difference in such standards.

"This, however, does not mean that the union and the employers in one bargaining unit are free to bargain about wages, hours, and working conditions of other bargaining units or to attempt to settle these matters for the entire industry.

"The union has a duty to bargain unit by unit in order to best serve its obligations to its members.

"The Union should retain the ability to respond to each bargaining situation as the individual circumstances might warrant without being straightjacketed by some prior agreement with favored employers."

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this was a misspoken phrase, as the District Judge in the remainder of the charge more than adequately conveys the idea that the disallowed conduct is when an employer (or a multi-employer bargaining unit) combines with a labor unit to impose certain labor standards or conditions on other bargaining units or employers.

These instructions, portions of which are taken from *UMW v. Pennington,* 381 U.S. 657 (1965), adequately explained to the jury what types of conduct a labor union may engage in without fear of antitrust violation repercussion. The instructions also advised the jury under what circumstances otherwise lawful union activity would result in an antitrust violation. See generally, *Allen Bradley Company v. Local Union No. 3, International Brotherhood of Electrical Workers,* 325 U.S. 797 (1945); *United States v. Hutcheson,* 312 U.S. 219 (1941); *Ramsey v. United Mine Workers, supra.* The Union complains that the expression "exemption" was only used once in the instruction. It is interesting to observe that even in UMW's proffered instruction on this subject (see n. 8) the expression "exemption" was not used. While a party has the right to have his legal claims of defenses stated to the jury by way of instructions, so long as the District Judge accurately states these claims or defenses, there can be no grounds for objection simply because the exact wording or phrasing of the requesting party are not used.

The Union contends that the instructions in this case were as fatal as those given in *Cedar Crest Hats, Inc. v. United Hatters, Cap and Millinery Workers International Union,* 362 F.2d 322 (5th Cir. 1966). That suit involved a labor union against whom charges of antitrust violations and unfair labor practices were made. On appeal the union objected to the court's instructions which did not even mention that certain conduct engaged in by a labor union does not fall within the scope of activities violating the antitrust laws. A comparison of the trial court's instruction in that case (appearing at 362 F.2d 322, 325-326) with the instructions given in

the instant case, *supra,* respecting a labor union's conduct in regard to the antitrust laws clearly indicates that the instructions in question on this appeal were both correct and fair.

D. EQUAL HYPOTHESIS RULE

Appellants contend it was error for the District Court not to instruct the jury that "where proven facts give equal support to each of two inconsistent inferences, in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover." *Pennsylvania Railroad Company v. Chamberlain,* 288 U.S. 333, 339 (1933). It is argued that such an instruction is a necessary component of the law applicable to circumstantial evidence and was properly given in *Ramsey v. United Mine Workers,* 265 F.Supp. 388 at 432 (1967), and *Tennessee Consolidated Coal Company v. United Mine Workers* (unreported District Court opinion) and respectively affirmed by this Court in *Ramsey v. United Mine Workers,* 416 F.2d 655, 665 (6th Cir. 1969), and *Tennessee Consolidated Coal Company v. United Mine Workers,* 416 F.2d 1192, 1202-1203 (6th Cir. 1969).

It appears that the "equal hypothesis rule" is simply a negative way of phrasing the rule of law that a plaintiff must sustain his burden of proof. Thus, if a plaintiff does not come forth with evidence, when considered in light of opposing evidence, from which a jury could infer the truth of an alleged proposition over its contra-proposition, the plaintiff has not met his burden of proof. When there are equal inferences which can

be drawn from a particular set of facts — one inference indicating liability, the other non-liability — it is the judge's obligation at the direct verdict stage of the trial to find for the defendant. See *Pennsylvania Railroad Company v. Chamberlain, supra; Gulf Refining Company v. Mark C. Walker & Son Company,* 124 F.2d 420, 426 (6th Cir. 1942). It would not be proper under these circumstances for the trial judge to relinquish to the jury this responsibility by simply giving them an instruction to the effect that if they could not draw either an inference of liability or one of non-liability from the facts presented, they should conclude non-liability.[10]

In this case the District Court instructed the jury on the meaning of plaintiff having to sustain the burden of proof by a preponderance of the evidence. He stated:

> "Now, in order to recover, the South-East Coal Company must sustain the burden of proof; in other words, if no proof was offered, there would be no

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10. The *Ramsey* case relied upon by appellants was a non-jury case. On appeal an observation — not an instruction — made by the District Judge in his opinion was quoted with approval. Since the "equal inference" rule or doctrine is used by the trial judge in deciding the question of whether a directed verdict should be granted a defendant because plaintiff has not satisfied his burden of proof, it is both logical and correct that this rule entered the trial judge's thinking in the non-jury trial in *Ramsey*. It is doubtful that the equal inference instruction given in *Tennessee Consolidated* to the jury was correct. However, this apparently was not assigned as error on appeal as no mention whatsoever is made of that instruction or the propriety of its use in the appellate opinion in the case. See *Tennessee Consolidated Coal Company v. United Mine Workers,* 416 F.2d 1192 (6th Cir. 1969).

judgment for the plaintiff. It is his responsibility to offer proof to establish the facts that he claims.

"And the defendant has the right, as you have seen here, to offer proof to contradict those facts or to explain those facts or to justify its conduct, which may have been brought out by witnesses for the plaintiff in support of its allegations.

"But it is the responsibility of the plaintiff to sustain this burden of proof. Now, by 'burden of proof,' it doesn't necessarily mean the greater number of witnesses. Sometimes the burden of proof in lawsuits can be sustained by one witness as contrary to fifteen on the other side, and so you are not to confuse the idea of 'burden of proof' with numbers of witnesses or numbers of depositions or other articles of evidence that might be offered.

"But it must convince you, before this plaintiff may recover, it must sustain its burden of proof by proving every essential element of the claim, by a preponderance of the evidence.

"Should it fail in its proof, under this rule you should find for the defendant.

"To establish the preponderance of the evidence means to prove that something is more likely so than not so; in other words, the 'preponderance of the evidence' means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely to be true than not true."

These instructions explained what South-East had to prove and to what degree the jury must be convinced of the truth of South-East's assertions. It was not error for the District Court to refuse to give the "equal hypothesis" instruction requested by appellants.

E. INSTRUCTIONS RESPECTING THE USE TO BE MADE BY THE JURY OF CERTAIN HEARSAY STATEMENTS

Consolidation raises as error the District Court's refusal to give a concluding instruction to the jury regarding the permissive use of certain statements which were competent evidence as against the Union but were hearsay as applied to Consolidation. The rejected instruction stated in part that:

> "During the trial the Court has permitted the introduction of evidence concerning the actions and statements of each of the defendants with specific admonition to the jury, however, that the members of the jury must not consider that evidence against the other defendants . . . . Inasmuch as there can be no liability on the part of the defendants unless a conspiracy is (proven) . . . you must disregard all of such evidence unless you first find by other and disassociated evidence in the case sufficient . . . proof that the conspiracy claimed by plaintiff existed. In such event you may then consider the evidence subject to the admonition in concert with all the other evidence in the case."

A requested instruction similar to this was not given in *Schmeller v. United States,* 143 F.2d 544, 550 (6th Cir. 1944), and it was held reversible error. This case lends the strongest support for Consolidation's

position. However, since the *Schmeller* case was decided, the logic and correctness of a jury charge that instructs that certain hearsay statements as to one defendant cannot be used by the jury in determining whether a conspiracy exists between defendants until the jury has first concluded that the defendants are guilty of an unlawful conspiracy, has apparently been seriously challenged. In addition, appellants' reliance on *Schmeller* is not entirely appropriate as part of the reason the Court found error in the refusal to give the instruction was that there were both substantive charges and a conspiracy charge involved. In the instant case we are dealing only with a conspiracy charge. In *Carbo v. United States,* 314 F.2d 718, 736 (9th Cir. 1963), an instruction almost identical to that offered by Consolidation in this case was held to have been properly rejected as not a correct statement of the law. The Court in *Carbo* observed:

> "The situation is rendered confusing by the fact that the admissibility of this evidence (concededly relevant but challenged under a technical evidentiary rule of competence) depends upon a disputed preliminary question of fact which coincides with the ultimate jury question upon the merits. (Footnote omitted). The declarations are admissible against the defendants if they are co-conspirators. If they are co-conspirators, they are guilty. The problem presented to us is whether the preliminary question (upon the resolution of which only independent evidence is available) is to be resolved by the jury or by the judge. Appellants' view of the law [which, except for the standard of proof is identical to that asserted by Consolidation] . . . is

that the preliminary question is to be resolved by the jury upon proof beyond a reasonable doubt.

"Yet if by independent evidence the defendant's position as a co-conspirator is to be established by the jury upon their judgment beyond a reasonable doubt, there is no occasion ever to resort to the declaration at all. The district court in effect will have told the jury, 'You may not consider this evidence unless you first find the defendant guilty.' "

[Bracketed explanation is this Court's].

While *Carbo* and many of the cases which have dealt with this problem are criminal in nature, therefore requiring the jury to conclude the existence of a conspiracy beyond a reasonable doubt, the paradox of instructing a jury that certain statements can be used to establish a conspiracy only after they have already found the conspiracy to exist is just as illogical in civil cases, although a lesser standard of proof is required. Thus, it is concluded that the preliminary question of the admissibility of evidence challenged under this technical evidentiary rule (this is clearly a question of admissibility and not of sufficiency or weight of the evidence, *Wong Sun v. United States,* 371 U.S. 471 (1962)) is a matter for the judge not the jury to decide and, therefore, the instruction was properly rejected by the District Court. We deal here only with the propriety, as a legal matter, of the District Court's refusal to give Consolidation's proposed instruction, and the question of whether the Court erred in admitting these statements because no prima facie case was established will be considered later, *infra.,* see pp. 33-34.

F. INSTRUCTIONS RESPECTING THE PROTECTIVE WAGE CLAUSE AND "80-CENT CLAUSE" IN THE NATIONAL AGREEMENT

Alleged errors in the District Court's instruction regarding the Protective Wage Clause (PWC)[11] and the "80-cent clause"[12] presents a legal problem the reso-

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11. See *Ramsey v. United Mine Workers,* 416 F.2d 655 and *Tennessee Consolidated Coal Company v. United Mine Workers,* 416 F.2d 1192 for a discussion of the PWC and the complete text of the clause.

12. The "80-cent clause" of the National Agreement provided:

"UNITED MINE WORKERS OF AMERICA
WELFARE AND RETIRMENT FUND OF 1950
(As Amended)

"Amend the first printed paragraph of subsection A of this clause by striking out all of the second sentence beginning with the word 'During' and ending after the word 'sale' and inserting in lieu thereof the following: 'During the life of this agreement there shall be paid into such Fund by each operator signatory hereto the sum of forty cents (40 cents) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall, during the life of this agreement, be paid into such Fund by each such Operator signatory hereto or by use or for sale. On all bituminous coal procured or any subsidiary or affiliate of such Operator signatory hereto the sum of (80 cents) [sic.] per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40 cents) per ton had not been paid into said Fund prior to such procurement or acquisition. The parties hereto mu-

lution of which may be helped by a brief discussion of the clauses and the role they played in the various national labor agreements in which they appeared. The National Bituminous Coal Wage Agreement entered into between the Bituminous Coal Operators Association (BCOA) and the United Mine Workers in 1950 was amended in 1958 thereby incorporating the Protective Wage Clause. The arrangement provided by the clause was that the United Mine Workers agreed, as bargaining agent for the employees covered by the contract (members of the UMW), that while the contract was in effect it would not enter into, or be a party to any agreement covering wages or working conditions which were not on an equal basis with those provisions contained in this contract. In return for this commitment, the coal producing signatories to the NationalAgreement (BCOA members) agreed "that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under

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tually agree that, if at any time during the term of this agreement a court or tribunal of competent jurisdiction determines by final decision that the provision appearing in the sentence just preceding, providing for the payment by signatory operators of eighty cents (80 cents) per ton under certain prescribed conditions, is invalid or in violation of the National Labor Relations Act, as amended, or other federal or state law, the parties shall, at the option of and upon demand by party of the second part, without affecting the integrity of any other provision of this section or any other provision of the National Bituminous Coal Wage Agreement, meet and engage in good faith negotiations to agree upon a clause to be inserted into this agreement in replacement of the provisions found invalid or unlawful."

a sub-contract arrangement shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this contract."

The "80-cent clause" of 1964 amended the Welfare and Retirement Fund provisions of the 1950 National Agreement. The Protective Wage Clause was dropped from the Agreement in that year. Until this amendment went into effect signatories to the National Agreement had to pay into the Welfare Fund forty cents per ton of coal they produced. The purpose of the amendment was to obligate signatories who procured or acquired bituminous coal for sale or use which was not produced under an agreement requiring the paying of forty cents per ton into the Welfare Fund (non-UMW produced coal) to pay eighty cents into the Welfare Fund for each ton of coal so procured. While the stated purpose of the amendment was to protect work standards by equalizing labor costs between employees of signatories and non-signatories, the obvious effect was to discourage signatories from purchasing or acting as sale agents for coal companies which produced coal with non-UMW laborers.

The legality of the Protective Wage Clause, in terms of the antitrust laws, was considered in the *Ramsey* and *Tennessee Consolidated Coal* cases. In *Ramsey,* responding to the allegation that the PWC was a per se violation of the Sherman Act, the Court (all judges concurred in this portion of the opinion) observed that the clause was capable of two opposite constructions. However, the proper interpretation to be given the clause was the one "that does not result in a violation of the law." *Ramsey* at 659. In *Tennessee Consolidated Coal* the jury's general verdict imposing liability on the Un-

ion concluded that the PWC required the Union not to bargain with non-signatory operators except upon the terms and conditions of the National Agreement, 416 F.2d 1192, 1197 (6th Cir. 1969). The jury also found in response to special interrogatories that "prior to and apart from" the National Agreement as amended in 1958 the UMW did not conspire with signatory coal operators to impose the terms of the National Agreement on non-signatories. It should be noted that except for several minor alterations in the 1950 National Agreement made by the 1958 amendment, the addition of the Protective Wage Clause by the amendment constituted the major change in the National Agreement. On appeal on *Tennessee Coal,* this Court stated that the contract, the PWC, was ambiguous and that all circumstances surrounding the contract and the practical construction given it by the parties could be used by the jury in determining the meaning of the contract. While it cannot be said with absolute certainty upon which theory or basis the jury chose to impose liability in the *Tennessee* Coal case, it seems that the jury felt that the PWC was the crux of the Union's illegal conduct.[13]

The legality of the "80-cent clause" in terms of the antitrust laws has not been considered by an appellate court. When the "80-cent clause" was incorporated into the National Agreement, charges that it violated Section 8(e) of the National Labor Relations Act were raised. See *Lewis v. National Labor Relations Board,*

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13. The *Tennessee Coal case* was decided a week after the *Ramsey* case. However, it is not clear what effect *Ramsey* has on the findings of the jury in *Tennessee Coal.* Certiorari was denied in *Tennessee Coal* but granted in *Ramsey.*

350 F.2d 801 (D.C.Cir. 1965); *United Mine Workers v. National Labor Relations Board,* 399 F.2d 977 (D.C.Cir. 1968). A final determination of this question has not been made.

Appellants maintain that the instruction with respect to these clauses failed to "adequately or accurately" explain the significance of these provisions and the proper legal interpretation that should be given them. Specifically, they contend that the District Court's instructions were in contradiction in so far as they instructed the jury that the contracts or national agreements containing these clauses were legal, but that they, the jury, could conclude that an antitrust violation occurred if they found that the agreements were entered into with the intention of driving certain coal producers out of business. It is argued that this is paradoxical and that either the agreements were legal or illegal. South-East contends that the instructions were accurate and more than adequate because they admitted the legality of the clauses in the national agreements, but based their claim of antitrust violation on the theory of the existence of an "intentional predatory conspiracy" as developed by Mr. Justice White's opinion in *Pennington.* Neither of these positions is a wholly correct interpretation of the law as stated in *Pennington.*

In *Ramsey* the Supreme Court's decision in *Pennington* was examined with particular attention or agreement between an employer and a labor union might produce grounds for concluding that an antitrust violation occurred. It was in *Ramsey* that it was decided that "the language of the agrement (PWC) did not per se constitute an illegal conspiracy." In addition, *Penning-*

ton was construed to have held that "a conspiracy between employers and labor formed with the intention of driving competitors out of business is a violation of the Sherman Act" and that " 'predatory intent' (as used by Mr. Justice White, 381 U.S. at 668 . . .) is merely shorthand employed to describe this anti-competitive conspiracy."

Reviewing the *Ramsey* decision's interpretation of *Pennington* four conclusions may be drawn applicable to the present dispute. First, the National Agreement containing the Protective Wage Clause, is on its face, a valid labor contract which seeks to implement the perfectly legal goals of uniformity of wages and working conditions. Second, if this agreement was made or entered into by the union in pursuance of its own self interest, ther [sic.] are no grounds for concluding a violation of the antitrust laws. Third, if however the employers and union entered into this contract with the conscious knowledge or intent that it would be used to drive competitors out of business (more than the incidental effects caused by the adoption of a uniform wage agreement which may result in certain operators not being able to function profitably), then a violation of the antitrust laws has occurred. Fourth, it is this either expressly or impliedly agreed-upon use of the valid contract, that is, that it will be used to drive competitors out of business, that comprises the agreement or conspiracy which is illegal for purposes of the antitrust laws. Without deciding the question of the legality of the "80-cent clause" suffice it to be said that these conclusions are also applicable to that provision.

The District Court gave the following instruction with regard to the National Agreement, the nature of

an illegal conspiracy and what South-East was required to show before the jury could impose liability on the defendants:

> "In order to establish a conspiracy or unlawful arrangement as claimed by the plaintiff in this case it is not necessary that the plaintiff should offer proof of a direct arrangement or executed written contract that they are entering into a conspiracy.
>
> "It is not necessary that the agreement, if any, was the result of formal action on the part of the defendants. The real question to be determined is whether or not there was a meeting of the minds or a common understanding and purpose in the requirement of the execution of the labor agreement with the intention of doing injury to the plaintiff.
>
> * * * * * * *
>
> "The thing which you will have to decide and which I will probably refer to again, there is nothing unlawful about that contract in itself; but if it was entered into with the intention on the part of the signatories — the two defendants here — to injure the plaintiff, if they had that in mind, that 'we are going to go into this contract because we know it will put South-East out of business; they can't meet the conditions; we are too big, too strong, and they cannot compete with us, cannot get miners to work for them, and they cannot sell their coal on the market because they do not have sufficient sales agency, so we will deliberately enter into this and they can't meet it; we will thereby profit by putting

competitors out of busines or seriously hampering his operation.'

"So, the issue is: Did these two signatories have that thing of putting the South-East Coal Company out of business in mind, the time they signed the contract?

* * * * * * *

"You are instructed that if you believe there was an industry-wide collective bargaining agreement, whereby employers and the union agreed on the wage scale that exceeds the financial ability, of some small operators, including the plaintiff, to pay, and that the agreement was made for the purpose of forcing some employers, including the plaintiff, out of businesss, or injuring its business, and you believe that the defendants, the Consolidation Coal Company and the United Mine Workers, deliberately entered into and participated in such an arrangement, and that the result of such an arrangement was the sole cause of damage, if any, to the plaintiff, then you will find for the plaintiff.

"If you do not so believe, you will find for the defendants."

It was not necessary for the District Court to go into more detail about the significance of the PWC or the "80-cent cluase."[14] The charge properly instructed

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14. During closing arguments counsel for UMW objected to certain statements made by counsel for South-East about the National Agreement. The District Court at that time gave further instructions to the jury about the PWC. The colloquy was as follows:

the jury on the relationship between the National Agreement and the antitrust laws and what must be shown in this regard to impose liability.[15]

The Court: "As I understand counsel's argument, he is drawing a deduction from these circumstances. He does not argue, and the jury is instructed, if it has been given that impression, that it is not proper.

"There is nothing wrong per se, that is, of itself, with the execution of this contract. I should instruct them on that as a general instruction.

"In other words, you are not to consider that simply because there was an agreement between BCOA and the UMW that that of itself established a violation of the antitrust laws.

"I got the impression that he was using those figures to establish his claim that the results proved the basis on which he relied."

South-East's Counsel: "The circumstances at the time of making these contracts, they have got to be used to prove an antitrust claim."

Appellants' Counsel: "I submit to the Court that the same words that were used at the bench as being objectionable were used by this counsel to the same effect, that this jury would have to consider the consequences of this type of bargaining, eliminating from the whole industry certain people and causing a good deal of harm."

The Court: "The jury is instructed that the execution of the contract itself is not per se a violation of law."

Appellants' Counsel: "Okay."

15. Appellants also claim error in the instruction because of remarks made by the District Judge which were incorrect statements of certain dates involving passage of the PWC and "80-cent clause." In the suplemental [sic.] instructions the District Judge corrected himself and no prejudice resulted from the error.

G. THE DEFENSE OF IN PARI DELICTO ASSUMPTION OF RISK OF THE CONSPIRACY, WAIVER OF RIGHTS ARISING FROM THE CONSPIRACY AND ESTOPPEL.

Appellant Consolidation Coal claims error in the District Court's instruction on its various defenses. Particular emphasis is assigned to the alleged error in the District Court's instruction on the defense of *in pari delicto*. With reference to this defense, the District Court charged the jury that:

> "Now, the defendants here say that, admitting all of these things for the sake of argument, as we put it, whatever damage came to the plaintiff, that he was a part of it.
>
> "He can't claim anything against the coal operators because this arrangement which they had with the UMWA had his approval and endorsement, that he was a member of the BCOA — Bituminous Coal Operators Association — that drew up the contract, and that he was a sponsor of it and, therefore, if he got hurt by it, if it was wrong, he was helping in a wrong, "impari delicto' (sic) they call it. That is equal guilt.
>
> "A person who is of equal guilt cannot claim that he has been wronged by other people who assisted or collaborated with him on the same project.
>
> "The defendants have entered the defense of 'in pari delicto' — this means that the defendants say that if an unlawful conspiracy existed, plaintiff was equally responsible with defendants in the formation of said conspiracy.

"Under this defense, the Court charges you that if the plaintiff was a co-initiator of the conspiracy and equally responsible therefor, plaintiff is not entitled to recover damages for that period of time that the plaintiff remained a party to the conspiracy.

"Now, a person may be a party to such an arrangement, be 'in pari delicto,' but he can withdraw from that. You are not once brushed with tar that you can't get rid of.

"So, even though you may believe that he did do this, that he was in this arrangement, entered into this contract for the purpose of putting other operators out of business, yet, if you believe that he withdrew from and he got out of it and if you find that the defendants were more responsible than the plaintiff for the formation of the conspiracy, plaintiff may recover, even though it was a party to the conspiracy, even though South-East Coal Company was a party to the conspiracy.

"Even though you may find that plaintiff was a party to the conspiracy and if you find that plaintiff withdrew from the conspiracy and sought to avoid the effects of the conspiracy, it may recover damages arising in the period of the case subsequent to such withdrawal."

This charge more than adequately instructed the jury with respect to the defense of *in pari delicto,* and the effect South-East's participation in the conspiracy would have on the amount of damages recoverable if termination of its part in the conspiracy did not occur. The only difficulty with the instruction is that perhaps

it should not have been given at all. Recent cases have tended to indicate that for reasons of public policy the defense of *in pari delicto* is not available to a defendant in certain types of antitrust cases. See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968); *Gaines v. Carrollton Tobacco Board of Trade, Inc.*, 386 F.2d 757 (6th Cir. 1967); *Sahm v. V-1 Oil Company*, 402 F.2d 69 (10th Cir. 1968). However, since it has been concluded that the instructions given on this defense were correct, it is not necessary to reach the question of whether the type of antitrust conspiracy involved in this case falls into the category of those antitrust conspiracies in which the defense of *in pari delicto* is available.

Consolidation's request for instructions on its defenses of assumption of risk of the conspiracy, waiver of rights arising from the conspiracy and estoppel were properly rejected by the District Court. While these defenses might be proper in certain negligence and contract cases, there is no evidence that Congress intended that these defenses could be set up by analogy as a defense in an antitrust case. Furthermore, even if these defenses were available, it appears that they would be subsumed in the more inclusive defense of *in pari delicto.*

H. INSTRUCTIONS DEALING WITH THE ISSUE OF BAD BUSINESS JUDGMENT.

Consolidation also claims that the District Judge negated one of its primary contentions with certain remarks made in the instructions. The primary contention allegedly negated by the District Judge's statements was that much of the injury South-East sought

recovery for did not result from the antitrust conspiracy but rather was caused by a "serious mistake in judgment in building a cleaning plant costing $5 million and at a point some one hundred twenty-five miles from the mine . . ." The remarks made by the District Judge concerned only in a very general fashion the importance of a cleaning apparatus in processing bituminous coal and the expensiveness of such a device [sic.] There was copious testimony at trial on both sides of the issue of whether the building of the cleaning plant by South-East was or was not a mistake in business judgment. The alleged prejudicial statements on this matter were made at the very beginning of the charge during a general discussion of the bituminous coal industry when the meaning of certain jargonistic words and phrases used in the coal industry and at the trial were explained to the jury. Towards the end of the instructions, the judge charged the jury on appellant's bad business judgment theory of the cause of South-East's injuries. He stated:

> "The defendants take the position that the (conspiracy did not cause plaintiff's injuries) ... (but the injuries were) the result of either mismanagement, over expansion, economic conditions, or a combination of these, with possibly other circumstances, to none of which either of these defendants had any part.
>
> "That is the theory of the defendants here, that by building this cleaning plant at Irvine, that there was a significant miscalculation of its cost of construction, more than a million dollars it anticipated to cost; that it was 125 miles in haul

from the mines to that plant, which was an additional expense and contrary to good coal production management, and that by loss of the sale of coal through no fault of Consolidation Coal Company, but through the failure of the plaintiff to exercise orthodox business acumen; that that is what caused this plaintiff to lose money, and that through its own failures and no reason to accuse either of these defendants to have committed wrongful acts; the financial problems of the plaintiff arose from its own actions and its own failure to exercise good business judgment in the face of advice on the part of Consolidation Coal Company, according to Mr. Tucker, I believe, who was the witness — is that his name?

Appellants' Counsel: "Cassidy."

The Court: "The last witness who testified. Well, anyway, one of the witnesses for the defendant [said] that he was concerned about the building of this tipple and this cleaning plant, and advised the plaintiff, through its president, Mr. LaViers, and possibly others, that importation from Canada and other places and the use of gas and oil was going to reduce the coal demands thirty-three and a third per cent from locality, or more. Notwithstanding that, this plaintiff proceeded to its development and expansion, and that these defendants were in no way responsible for it. But, due to these circumstances alone, if he had any loss, it was caused by that."

If there was a negation of one of appellant's theories by the passing remarks made by the District

Judge at the beginning of the charge to the jury, it obviously was more than compensated for by the explanation of appellant's position just quoted. It is concluded that appellants were not prejudiced by certain complained of statements made by the District Judge in his instructions to the jury.

II. ALLEGED ERRORS IN EVIDENTIARY MATTERS

A. Evidence of Effects and Consequences of the Alleged Antitrust Conspiracy

The appellants challenge the District Court's ruling on certain evidence offered by South-East which concerned economic conditions in the coal industry in Eastern Kentucky. The evidence was principally statistical and related to such things as: the reduction in the number of miners employed in the coal industry, diminution of population in certain coal producing areas, wage scales in the bituminous coal industry, quantitive fluctuations in coal production in various years, income and losses of certain bituminous coal producing companies. The objection raised to this type of evidence was that it inordinately emphasized alleged "effects and consequences" of the antitrust conspiracy, thereby misleading the jury to believe that the existence of an anti-competitive conspiracy or agreement could be inferred from these conditions. It is argued that this Court's decisions in *Lewis v. Pennington*, 400 F.2d 806 (6th Cir. 1968), and *Ramsey v. United Mine Workers,* 416 F.2d 655 (6th Cir. 1969), and the Supreme Court's decision in *Pennington v. United Mine Workers,* 381 U.S. 657 (1965), specifically rejected the theory that an antitrust conspiracy can be proven by effects and consequences. The argument is not clear, but it appears that objection is

not made to the admissibility of this type of evidence, rather that this type of evidence standing alone cannot, as a matter of law, serve as the basis for concluding that an antitrust conspiracy exists.

In *Pennington v. United Mine Workers* the Supreme Court stated that a labor union, having concluded a wage agreement with one set of employers, may unilaterally seek to impose the same terms on other employers even though it is believed that "[s]ome employers cannot effectively compete if they are required to pay the wage scale demanded by the union." *Pennington v. United Mine Workers,* at 655, n.2. It was also observed that "[s]uch union conduct is not alone sufficient evidence to maintain a union-employer conspiracy charge under the Sherman Act. There must be additional direct or indirect evidence of the conspiracy." *Pennington v. United Mine Workers, Id.* The textual material, not the language of the footnote quoted above, appears in *Lewis v. Pennington* and *Ramsey v. United Mine Workers.* Appellants' argument apparently relies upon the language quoted above from the Supreme Court's *Pennington* decision. They construe this language to mean that evidence of the effects and consequences of an alleged conspiracy, *e.g.* statistics showing marginal producers are losing money and going out of business, reduction in the number of individuals employed as coal miners, et cetera, are insufficient to prove an antitrust conspiracy.

It cannot be said definitely that appellant's interpretation of the language in *Pennington* is either right or wrong. While this Court finds it difficult to construe that particular language in *Pennington* as appellants have, some support for appellants' interpretation of

that language can be found in Mr. Justice Goldberg's dissenting opinion in *Pennington* appearing in *Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America v. Jewel Tea Company, Inc.*, 381 U.S. 676 (1965) at 714-715. Even though the language in *Pennington* is not decisive, there is a logical basis for appellants' position. The "effects and consequences" theory is basically a casual argument. That is, a cause (the antitrust conspiracy has produced certain results or effects (reduction in the number of people employed in the mines, financial losses by marginal producers, et cetera.). This type of argument has one chief flaw: The difficulty in isolating a single factor causally responsible for identifiable effects. Often there are intervening and superseding causes which if shown destroy the validity of the argument. The "effects and consequences" theory appellants question appears to simply reverse the usually logical progression from cause to effect by first pointing to certain conditions and then concluding what caused these conditions. In any event, the problem of isolating a particular cause which definitely produced certain effects is still present. The law cannot be that an antitrust conspiracy can be proven by alleged effects and consequences of the conspiracy alone. If the only evidence a plaintiff could produce of an alleged antitrust conspiracy is statistics showing that they and other producers in an industry are losing money while some producers make money; that overall production in the industry is down while profits of certain companies are up; and that employment has dropped off in the industry, the defendants should have a verdict directed for them at the close of plaintiff's case. Plaintiff would not even have made out a prima facie case for recovery.

Regardless of how accurate these statements might be, they do not apply under the facts of this case. Reviewing the record, it becomes obvious that contrary to appellants' contention South-East's case does not rest solely on alleged effects and consequences to prove the existence of the antitrust conspiracy. South-East presented evidence of statements made by UMW and Consolidation officials tending to show that there existed an implied or expressed agreement between the Union and Consolidation, there was evidence of past courses of dealing and performance between itself and Consolidation which were interrupted or changed as a result of Union activity; there was evidence concerning what happened at bargaining sessions between South-East and the Union which indicated that some agreement other than the National Agreement (the Bituminous Coal Wage Agreement) existed between the Union and certain producers.

While the question of the sufficiency of this evidence will be dealt with later, the importance of indicating that South-East introduced other evidence from which the existence of an agreement to restrain trade or competition could be inferred, is to show that it did not rely solely on alleged effects and consequences of the antitrust conspiracy to prove its claim. If the only evidence South-East introduced was the statistical evidence referred to earlier, then the case should never have been submitted to the jury. However, this was not the only proof they offered. Evidence of the type which appellants object to is admissible and can be considered by the jury in drawing its conclusion on the issue of liability if there is other evidence which supports the claim. See generally, *Local 175 of the International*

Brotherhood of Electrical Workers v. United States, 219 F.2d 431 (6th Cir. 1955); *Standard Oil Company of California v. Moore,* 251 F.2d 188 (9th Cir. 1957), cert. denied 356 U.S. 975. Therefore, while appellants' argument might be correct as far as it goes, it does not apply to the facts of this case.

B. EVIDENCE AND STATEMENTS WHICH ALLEGEDLY PERSONALIZED SOUTH-EAST CLAIMS THEREBY PREJUDICING APPELLANT

Consolidation maintains they were prejudiced because certain evidence admitted and statements made at the trial tended to personalize South-East's claim that is, gave the impression that it was the claim of the LaViers' family which controls and operates the company. It is contended that this left the jury with the idea that this was a David versus Goliath type controversy, with the LaViers family representing the small South-East Coal Company battling the combined giant forces of Consolidation Coal Company and the United Mine Workers of America. Thus, appellants argue that because of this characterization, the jury's sympathies had to be with the underdog South-East Coal.

South-East Coal Company, for all intents and purposes, is a family-owned and family-run coal company. Mr. Harry LaViers, Senior, and his son, Harry LaViers, Junior, were the controlling forces behind South-East and made the decisions, either good or bad, for the company. The company, compared to Consolidation, is a small producer of coal and its actions are earmarked with the LaViers' name. While there was some personalization of the company's claim by occasional interchanging of the name plaintiff with Harry LaViers,

Senior or Junior, this was no more excessive than might be expected under the circumstances. In addition appellants, partially as a result of the defense of *in pari delicto,* tended to contribute to any personalization which may have taken place.

Conceding that some personalization of South-East's claim did occur, it is still difficult to accept appellant's argument that this converted the dispute into a small company versus large company controversy, or appellant's assumption that a jury's sympathies always rest with the underdog. Without some additional evidence that appellants were in fact prejudiced by these characterizations, the record does not support these assertions, and it is concluded that no injury resulted.

C. ADMISSIBILITY OF CERTAIN HEARSAY STATEMENTS

During the trial, South-East introduced into evidence portions of answers made by the United Mine Workers to written interrogatories. The Union was asked to admit to the authenticity of certain speeches, editorials and statements made by Union officials which were appended to the Union's answers to the interrogatories, and then parts of these documents were read to the jury. Consolidation objected to and now challenges the admissibility of these statements on the grounds that they were hearsay as against them. (Consol's objection to the District Court's refusal to give its requested instruction on this matter was discussed earlier. See, I. ALLEGED ERRORS IN INSTRUCTIONS: Section *E. Instructions Respecting the Use to be Made by the Jury of Certain Hearsay Statements,* supra, at p. 15). Consol's principal contention is that statements of this type are not to be admitted until "[t]here is inde-

pendent evidence establishing, prima facie, that such others were members of the conspiracy." *Standard Oil Company v. Moore, supra.*

The general rule is that this type of evidence is admissible, however, subject to exclusion if no prima facie case of the existence of the conspiracy is established. The question of conditional admissibility is for the trial judge to determine. *Carbo v. United States,* 314 F.2d 718 (9th Cir. 1963). There is no error in conditionally admitting the statements before a prima facie case was established by independent evidence if subsequently such a case is proven, because the trial judge has wide discretion over the order of proof. *Pennington v. United Mine Workers,* 325 F.2d 804, 817 (6th Cir. 1963), reversed on other grounds, 381 U.S. 657 (1965). *Flintkote Company v. Lysfjord,* 246 F.2d 368, 378 (9th Cir. 1957), cert. denied, 355 U.S. 835. At the close of plaintiff's case there had been established by independent or disassociated evidence a prima facie case, thus the requirement for having conditionally admitted the statements was met.

D. SUFFICIENCY OF THE EVIDENCE

Appellants contend that the jury verdict, and the District Court's denial of their motions for directed verdict and judgment notwithstanding the verdict are in error, as the verdict "is not supported by clear evidence, but is contrary to undisputed facts and applicable legal principles." Appellants' argument with regard to the "clear proof" standard has already been discussed. See, I. ALLEGED ERRORS IN INSTRUCTIONS, Section A. *The Standard of Proof Required to Impose Liability, supra,* at pp. 3-7. Furthermore, appellants' arguments

on applicable legal principles have also been dealt with, See I. ALLEGED ERRORS IN INSTRUCTIONS, pp. 3-28, and what remains is the issue of sufficiency of the evidence.

In considering the sufficiency of the evidence, little if any advantage would be gained by an itemized review of plaintiff's case. Much of the evidence introduced at trial was similar to that used at the trials in *Tennessee Consolidated Coal v. United Mine Workers* and the retrial of the *Pennington* case in *Lewis v. Pennington*. Yet there was additional evidence introduced at the trial having particular significance to South-East's claim and which tended to emphasize that South-East's case was unique from either *Tennessee Consolidated Coal* or *Lewis*. (A single example is the evidence of the circumstances surrounding the cancellation of the sales agency contract between Consolidation and South-East in which Consol acted as sales agent for South-East's coal.) While some of the evidence introduced was circumstantial, which in and of itself might not support the jury's verdict, there was also direct evidence which, when coupled with the circumstantial evidence, raised plaintiff's case from one of mere suspicion or conjecture to a level where reasonable minds might have concluded liability upon the part of the appellants. After reviewing the record, it is concluded that there was substantial credible evidence to support the jury's verdict. The District Court's decision on this matter was correct and appellants' motions for directed verdict and judgment notwithstanding the verdict were properly denied.

III. ALLEGED IRREGULARITIES WITH RESPECT TO THE JURY

A. Mr. LaViers' Sr. Conversation With Two Jurymen

Consolidation contends that the District Court committed reversible error in not declaring a mistrial because of a conversation Mr. LaViers, Sr., of South-East Coal, had with two members of the jury outside of court during the trial. The conversation took place in a coffee shop in the hotel where some of the witnesses, jurors, attorneys and parties in the trial were staying. Mr. LaViers was seated by a waitress at a table which was situated next to another table where two jurors were eating breakfast. The District Judge, after examining Mr. LaViers,[16] found that appellants were not preju-

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16. The Court made the following examination of Mr. LaViers in ascertaining what took place in the coffee shop:

(Reporter's note:) "The following occurred at the bench in the immediate presence of counsel and the Court, and in the absence and out of the hearing of the jury:

"The Court: I want to clarify this other situation before we get into anything else. This is out of the presence or hearing of the jurors, at the bench, in connection with the statement made to the Court by Mr. Schmidt, counsel for the defendant Consolidation Coal Company, with reference to two of the jurors, Mr. Hill and Mr. Osborne, who were seen in conversation with Mr. Harry LaViers, Sr., at the Coffee Shop of the Phoenix Hotel about 7:30 to 8:00 o'clock this morning, October 11, 1968.

"Now, then, do you want to make any further statement? I am just asking.

Off the record."

diced by this unintentional contact and declined to grant a mistrial.

Appellants maintain that the case of *United States v. Harry Barfield Company,* 359 F.2d 120 (5th Cir. 1966), controls, and a mistrial should have been granted on the basis of that authority. Reviewing the decision in *United States v. Harry Barfield Company,* it appears that several facts instrumental to that decision are lacking in the present case. In the *Barfield Company* case the prejudicial out-of-court conversation took place in an elevator between the president of the company and two jurors. The president of the company made an effort to approach the jurors and then "cemented" the contact by volunteering information that his wife and her family dealt with the drug store owned by one of the jurors. The Court observed:

(Reporter's note:) "An off-the-record discussion took place at the bench.

"The Court: Come here, Mr. LaViers, please. Mr. LaViers, it has been reported to the Court that this morning in the Coffee Shop at the Phoenix Hotel, you, in the presence of Mr. Schmidt and Mr. Rowntree—

"Mr. Schmidt: Mr. Rowntree was not present.

"The Court: No.

"Mr. Rowntree: As I stated, I was there earlier.

"The Court: Yes. I don't know who else was there. But you were seated near or standing near or in the company — not 'in the company,' I don't want to use that term — but in contact with Mr. Hill and Mr. Osborne, who are members of the jury. Now, do you recall that incident?

"Mr. LaViers, Sr.: Yes, I do, Your Honor.

"The Court: Would you mind stating just what it was?

"By way of summation it is clear that the taxpayer president approached the jurors. They did not approach him. He sought to identify with juror Lockhart through the fact of knowing about his drug business. He then sought to cement the identity by giving the juror his wife's name which led to a conversation regarding his wife's family. He apparently also managed to find out that the juror from the radio station had known his brother."

"Mr. LaViers, Sr.: Yes. Mr. Rowntree had gone down to breakfast prior to my coming down. When I came into the Coffee Shop, I looked for him and found that the table where he was seated only had one chair and I was looking around for some other table to sit at, and the head waitress came and said, 'Well, just sit down here' — which was right across the aisle from Mr. Rowntree — and I sat down on the bench and ordered my breakfast.

And Mr. Hill was sitting next to me, and he asked me, he said, 'Do you know Mr. Oscar Evans who lives in Paintsville?'

And I said, 'Well, he doesn't live in Paintsville now; he has gone to Florida — but I do know Mr. Evans.'

And he said, 'Well, I used to board at his house.'

And he said he was quite a character.

And I said, 'Yes, I agree with that,' and, 'I knew him very well.'

And then I believe that part of the breakfast, not the main part, was served, and Mr. Hill then asked me if I knew Mr. Nelson Howard who lived in Paintsville; and I said yes, 'I know Mr. Nelson Howard; he came from Gallatin County; he was in the automobile business there and later was in the coal business, I know him.' Mr. Hill said he used to work for him. I said, 'Well, he was quite an aggressive merchant when he was there, he made a

(See the dissenting opinion by Judge Colman in the *Barfield Company* case, at p. 124, questioning the majority's characterization of these facts.)

In the present case Mr. LaViers was seated by a waitress next to the jurors. He did not seek them out. Furthermore, it was a juror who aproached Mr. LaViers with a question about whether he knew certain individuals. Obviously, Mr. LaViers could have simply ignored the juror, but the law does not require that when a person becomes a party in a lawsuit that he must renounce all social amenities and rudely ignore people who ask him questions. The juror's questions were answered by Mr. LaViers in a straight-forward polite fashion, with-

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lot of money and decided he would go into the farming business and bought a couple of farms down in Bourbon County, and I understand, lost what he had of his investment in these farms.'

I guess the rest of the breakfast was served about that time. I don't recall that there was — there was some gentleman came in on the other side, and they turned to him to speak to him. I don't recall any further conversation.

There was nothing about this lawsuit.

"The Court: Do you want to ask him a question?

"Mr. Schmidt: Mr. LaViers, there were other places to sit down in the Coffee Shop besides next to Mr. Hill and Mr. Osborne when you sat down? Isn't that true?

"Mr. LaViers, Sr.: Well, yes, sir, there are other tables for four and tables for two and the tables at the bench are for two, and the head waitress came along and tossed a menu down and just said, 'Sit down here,' and I sat where she put the menu. I didn't seek out this seat.

"Mr. Schmidt: You saw them sitting there?

out any attempt to ingratiate himself to the juror. There was no discussion of the case. The facts of *Barfield Company* which were of principal significance in that decision are lacking here and the case is clearly distinguishable from the present dispute. While, of couse, these types of contacts must be scrupulously avoided if at all possible, the fact that in this case the contacts were brought about by a coincidence of circumstances, there was no intentional "seeking-out," and no discussion of the case occurred, the District Court's denial of the motion for a mistrial was proper and clearly not an abuse of discretion. *United States v. VanBuskirk,* 304 F.2d 871 (6th Cir. 1962).

"'Mr. LaViers, Sr.: Oh, yes, I saw them sitting there.

"Mr. Schmdit: Was it in your mind that, even so, it wouldn't hurt to develop some sort of a social rapport with these gentlemen?

"Mr. LaViers, Sr.: No, Mr. Schmidt, that was not in my mind. I am by nature a person who talks to people in the elevator or wherever it might be, and I would be untruthful and unrealistic if I didn't say I do engage in conversations.

"The Court: How many minutes would be [sic.] assume, or how much time, I should say, would you assume your conversation or what you stated to the Court, or anything in addition to that, was consumed with either of these men?

"Mr. LaViers, Sr.: Oh, there were snatches of conversation, I imagine about ten or fifteen minutes. I was eating breakfast.

"The Court: That covered the whole period?

"Mr. LaViers, Sr.: Well, not the whole period of breakfast, but the period of the conversation.

"The Court: Do you want to ask him anything further?

B. ALLEGED ERROR IN THE DISTRICT COURT'S REFUSAL TO DECLARE A MISTRIAL BECAUSE OF CERTAIN CONDUCT OF A JUROR

Appellants contend that they were denied their constitutional right to trial by an impartial jury because the District Court refused to grant a mistrial upon learning of certain alleged misconduct of a juror. Two matters are alluded to as indicating that the partiality of one juror was questionable. First, an incident occurred during trial which allegedly was misconduct on the part of the juror. An attorney for the Union developed the following facts: the juror and his wife attended a social function in Lexington, Kentucky, during the trial. It appeared that the juror's wife was a soroity sister and

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"Mr. LaViers, Sr.: Mr. Rowntree has continuously cautioned me about this.

"The Court: Well, you see the point is, I mean, The Court accepts your statement that you didn't say anything about the case.

"Mr. LaViers, Sr.: We didn't talk anything about the case, Your Honor.

"The Court: But, you see, the difficulty is that this more or less currying of favor with a juror — while I realize it isn't currying a favor deliberately —but it has brought questions to people's minds. I realize some people are just naturally friendly, and Kentuckians are just that way — I know them pretty well — but we mustn't do anything like this.

"Mr. LaViers, Sr.: I would be very, very happy to avoid them.

"The Court: The Court is confident that you didn't do anything intentionally. That is the ruling of the Court.

Now, do you have anything you want to ask him?

close friend of the wife of a lawyer who practiced in the coal mining area of Eastern Kentucky. The juror was also a close friend of the lawyer. These people met at the social function, and the juror mentioned that a third lawyer who practiced in the same coal mining region was an attorney for the Union in the trial in which he was a juror and that this attorney was "a very able lawyer". Then the juror's wife made some comment about the present case being difficult "in following a conspiracy or in following just what they were driving at with all the reading and all." It was not at all clear whether the juror's wife mentioned the word "conspiracy" or not. On these facts a motion was made to subpoena the juror and the people involved in this incident and examine them. The District Court concluded that "nothing (had) been shown here to justify an investigation of this juror" and overruled the motion.

Appellant cites *Mattox v. United States,* 146 U.S. 140 (1892), as controlling and requiring that under these circumstances an examination of the juror should have been granted. Under the facts in *Mattox,* it was obvious that an examination of the jurors should have taken place. In that case allegedly a court bailiff, pres-

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"Mr. Rowntree: No.

"Mr. Schmidt: May I ask him a question?

"The Court: Yes, sir.

"Mr. Schmidt: Mr. LaViers, you have seen each of those gentlemen sit at the same table every morning?

"Mr. LaViers, Sr.: No, sir, they have not, as far as my knowledge, sat at that same table. They do sit in the Coffee Shop there at various places, but I don't recall seeing them at that particular place, Your Honor."

ent when the jury was deliberating the verdict in a murder case, stated, so that the members of the jury could hear him, that "this is the third fellow he (the accused has killed." In addition, during deliberation the jury or part of it was read a newspaper account of the trial that included the following remarks:

> "If he (the accused) is found guilty of murder he will be a lucky man, for the evidence against him was very strong, or at least appeared to be to an outsider. The case was given to the jury at noon yesterday, and it was expected that their deliberations would not last an hour before they would return a verdict.
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> * * *
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> "It (the evidence) was so strong that the friends of Mattox gave up all hope of any result but conviction."

Under these alleged circumstances, the court should have ordered an examination of the jury to determine the accuracy of the purported misconduct. However, by no stretch of the imagination can it be argued that the facts surrounding the present incident of alleged misconduct approximates those in *Mattox*. While questions of jury improprieties are matters of degree, it cannot be said that the District Court abused its discretion in not ordering an examination of the juror and the other participants in the present incident without further representation or a stronger indication that some misconduct prejudicial to appellants' constitutional right to an impartial trial did in fact occur.

The second matter that appellants point to which they contend shows partiality upon the part of this

juror is that his insurance agency underwrote a real estate bond for the son of a former official of and present minor stockholder in South-East Coal Company. The juror was challenged for cause, but the District Court overruled the challenge. The examination of the juror showed that a $5,000 surety bond must be posted with the Commonwealth of Kentucky before a real estate broker can sell real estate. The juror's insurance agency underwrites the bond for the son of a former official and present minor stockholder in South-East Coal. The bond was first written several years before this litigation was commenced and simply has been renewed each year. Until informed, the juror did not know for a fact if he wrote the bond for the son or the father and, obviously, knew neither personally. Upon questioning, he stated that the fact he wrote the bond would not affect his judgment in any way. This case is distinguishable from *Commonwealth Coatings Corporation v. Continental Casualty Company,* 393 U.S. 145 (1968), cited by appellants to support their position that their challenge for cause of this juror should have been granted. In *Commonwealth Coatings* an individual acting as an arbitrator under a private contractual agreement had been an engineering consultant for one of the parties in the dispute and collected over $12,000 in fees in four years. The Supreme Court set aside an award made by the panel of three arbitrators holding that an arbitrator should disclose to the parties any dealings which might create an impression of possible bias. Factually and legally, the present case is different. Here a juror had only remote indirect contact with a party in a lawsuit. Even if the business contacts were more direct, all that *Commonwealth Coatings* requires is a disclosure of

these dealings. In the present case, the nature and extent of the juror's business contacts were disclosed and the District Court, upon examination of the juror, concluded that he could impartially hear the evidence and return a verdict free of any prejudice that might result from his business dealings. The District Court's refusal to grant the challenge for cause of this juror was not an abuse of discretion. *Holt v. United States,* 218 U.S. 245 (1910); *Cox v. General Electric Company,* 302 F.2d 389 (6th Cir. 1962).

IV. DAMAGES

A. The Jury Award of Damages

South-East sought damages allegedly resulting from the anti-competitive conspiracy in this case for a three and one half year period from April 26, 1962, to December 31, 1966. Two methods of computing these damages were used to arrive at a dollar amount.[17] The first method was a simple comparison between operating profits and losses[18] during the period 1952-1958, an arbitrary base period, with the operating profit and losses

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17. Computation of injuries by the first method produced a damages figure of $3,082,816. The damages figure produced by the second method was $2,896,713. The jury awarded damages of $2,410,452 or approximately $700,000 less than the damages computed by the first method and $500,000 less than computed by the second method.

18. Figures reflecting operating profit and losses rather than net income were used because these figures do not include such things as percentage depletion allowances which are treated as return of capital, interest payments (expenses) or income, capital gains and losses and dividend income.

for the period South-East sought recovery. A method similar to this was used in determining the antitrust damages in *Bigelow v. RKO Radio Pictures,* 327 U.S. 251, 258 (1946), and *Ford Motor Company v. Webster's Auto Sales, Inc.,* 361 F.2d 874, 885-886 (1st Cir. 1966).

The second method was more complex and was designed to meet certain objections appellants had to the first method. This method used various financial and managerial figures for the years 1964 and 1965 for a comparison with similar figures in 1962, 1963 and 1966. Thus, statistics during the actual damages period (1964 and 1965). Thus, statistics during the actual damages period (1964 and 1965) acted as a basis for computing damages for the entire period. Supporting this theory, South-East introduced six financial exhibits showing, in part: the effects higher mining costs and decreased production in 1962, 1963 and 1966 had on earning compared to the base years 1964-1965; the effect on earnings of two strikes in 1962-1963 and 1966 as compared with earnings in 1964-1965; lower price realization on coal in 1964-1965 than in the remaining years of the damage period; and the alleged effect the conspiracy had on South-East's price realization per ton of coal compared with the average price realization of the industry for the period 1962-1965. South-East maintains that by using this approach appellant's challenge to the validity of using figures for 1952-1958 for the comparison, because allegedly during the damage period internal and external economic conditions were less favorable than during 1952-1958, are effectively negated.

Appellants raise numerous issues regarding the validity of South-East's theories of damages. Mention

of four of the challenges will give some idea of the general nature of appellants' attacks. Respecting South-East's first method of computing damages, appellants contend that using the profit average of 1952-1958 for the comparison is unfair as "internal and external economic factors", i.e. less favorable mining conditions and a general overall depression in the coal market, varied between the years used as a basis and the actual damages period. The second method is challenged on the grounds that use of new equipment during 1964 invalidates the comparison of the financial and managerial date with the base period 1962-1963. The third objection is that both methods claim losses for Consolidation's refusal to handle South-East's coal and that these losses cannot be recovered from the Union. Finally, appellants complain that South-East's computed losses which were in part a result of its inability to get sufficient railroad cars to ship its coal and, therefore, were in no way attributable to the alleged conspiracy.

It appears that most of appellants' challenges to South-East's claims of damages are directed at the accuracy of the amount of damages and not the fact of damages. There was a general issue raised as to the lack of evidence showing that the proximate cause of Southeast's damages was the conspiracy; that is, the sufficiency of evidence showing the fact of damages. However, reviewing the record, it is clear that there was sufficient credible evidence from which the jury was justified in inferring the necessary causal relation between the conspirators' anti-competitive conduct and the claimed damage or injury. *Zenith Radio Corporation v. Hazeltine,* 395 U.S. 100, 125 (1969). The antitrust cases are legion which reiterate the proposition that, if

the fact of damages is proven, the actual computation of damages may suffer from minor imperfections. See, *Story Parchment Company v. Paterson Parchment Company,* 282 U.S. 555 (1931); *Bigelow v. RKO Radio Pictures, supra; Zenith Radio Corporation v. Hazeltine, supra; Ford Motor Company v. Webster's Auto Sales, Inc., supra; Atlas Building Products Company v. Diamond Block & Gravel Company,* 269 F.2d 950, 958 (10th Cir. 1959); *North Texas Producers Association v. Young,* 308 F.2d 235, 245 (5th Cir. 1962); *Flintkote Company v. Lysfjord,* 246 F.2d 368, 392 (9th Cir. 1957).

Appellant's principal grounds for objection to the jury verdict is that internal and external economic conditions and decisions of the management resulted in South-East's losses, and not the conduct of the alleged conspiracy. But the question of whether certain of South-East's losses were attributable to the conspiracy or other economic factors was for the jury's consideration and determination. *Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc.,* 383 F.2d 97, 106 (5th Cir. 1967), cert. denied, 390 U.S. 904; as is the question of the credibility of the witnesses used in showing damages, *Atlas Building Products Company v. Diamond Block & Gravel Company, supra* at 959. It is concluded that there was sufficient credible evidence to support the jury's verdict as to the fact of damages and the amount of damages was computed as precisely as capable under the circumstances.

B. ATTORNEYS' FEES

Appellants object to the award of attorneys' fees as unreasonable. A party seeking review of an award of attorneys' fees in an antitrust case has the burden of

clearly demonstrating error in the factual basis of the award or an abuse of discretion. See, *Armco Steel Corporation v. State of North Dakota,* 376 F.2d 206, 213 (8th Cir. 1967); *Twentieth Century Fox Film Corporation v. Goldwyn,* 328 F.2d 190, 221 (9th Cir. 1964). In this case appellants have not shown either an error in the factual basis of the award or an abuse of discretion.

The judgment is affirmed.

PHILLIPS, Chief Judge. (Concurring.) I do not interpret the opinion in this case to conflict with the opinion of Judge Edwards, in which I concurred, in *Ramsey v. United Mine Workers of America,* 416 F.2d 655 (6th Cir.), cert, granted, 38 U.S.L.W. 3379. I concur in the opinion prepared by Judge Brooks.

APPENDIX B

[See Jt. App. pp. 248 et seq.]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
RICHMOND

No. 303

SOUTH-EAST COAL COMPANY
v.
UNITED MINE WORKERS OF AMERICA
and CONSOLIDATION COAL COMPANY

Memorandum
Filed April 1, 1969

This action arises under the antitrust laws. After a trial extending over some four weeks, the jury returned a verdict in favor of the plaintiff, South-East Coal Company, of $2,410,452.00 in damages. Pursuant to section 15 of Title 15, United States Code, judgment was entered for three times this amount.

The record is before the court on the separate motions of the defendants, United Mine Workers of America and Consolidation Coal Company, for a directed verdict and for judgment notwithstanding the verdict, or in the alternative, for a new trial. They set forth numerous grounds in support of their motions, including allegations that the evidence was insufficient to support the verdict, that the verdict was contrary to the law and the evidence, that the court made various errors with regard to the admission of evidence, that the court erred in failing to admonish the jury not to consider certain evidence, that the court erred in permitting a witness

to use certain papers to refresh his recollection, that the court erred in failing to declare a mistrial because of an out-of-court conversation between an agent of plaintiff and two jurors, that the court erred in failing to declare a mistrial because of the argument of plaintiff's counsel, that the court erred in failing to sustain the challenge for cause to one of the jurors, that the damages were grossly excessive and speculative, that the court made numerous errors in instructing the jury, and other allegations of error. I do not intend in this memorandum to examine each of the arguments of the defendants individually or in detail. Nor will I attempt an exhaustive discussion of every issue raised in the excellent and very comprehensive briefs submitted by the parties. Instead I will discuss the various groups of issues in a general fashion.

This case, taken as a whole, was conducted in accordance with the guidelines set out in United Mine Workers of America v. Pennington, 381 U.S. 657, and Lewis v. Pennington, 6 Cir., 400 F.2d 806, cert. denied 37 L.W. 3209.

I.

The defendants contend that there was insufficient evidence or a lack of "clear proof" to support the verdict of liability.

To prove a conspiracy in violation of the antitrust laws, the plaintiff need not introduce direct evidence. The proof may rest, as it frequently does, on circumstantial evidence. Viking Theatre Corp. v. Paramount Film Distributing Corp., 3 Cir., 320 F.2d 285, 299, affirmed 378 U.S. 123, reh. denied 379 U.S. 872, reh. denied 382 U.S. 1001; Eagles v. Harriss Sales Corp., 4 Cir., 36

F.2d 927. In American Tobacco Co. v. United States, 328 U.S. 781, 809-10, the United States Supreme Court clearly stated: "The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words."

Fully aware that reasonable inferences, but not speculations, are a sufficient basis for finding antitrust liability (Ramsey v. United Mine Workers, E.D.Tenn., 265 F. Supp. 388, 432), this court is of the opinion that the existence of a conspiracy, including the requisite "predatory intent", even under the stringent clear proof test.

II.

The defendants contend that the plaintiff failed to prove, by clear proof or otherwise, that it was injured by a conspiracy on the part of the defendants, that plaintiff's proof of damages was too speculative and conjectural to have been submitted to the jury, and that the damages awarded were grossly excessive, not supported by the evidence, and the result of passion, prejudice and unaccountable caprice on the part of the jury.

At the trial, plaintiff introduced proof of damages under two theories. First, plaintiff attempted to show damages by comparing its operating profits from 1952 through 1958 with its operating losses in the period of alleged damage, May 1, 1962, through December 31, 1966. Second, plaintiff attempted to show damages by analyzing the business during the damage period.

It is well settled in actions brought under the antitrust laws that, although a verdict may not be based on mere speculation or guesswork, the jury may make a

reasonable estimate of the damage based on relevant data and on probable and inferential proof. Exactitude in the proof of damages is not required. Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264. Indeed, precision is often impossible in an action of this nature. "The determination of damages in an antitrust suit, however, almost invariably requires a certain amount of speculation, no matter how informed." Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 152 (Marshall, J., concurring). It should also be noted that elementary concepts of justice and public policy require that a wrongdoer must bear the risk of uncertainty which his wrong has created. Bigelow v. RKO Radio Pictures, supra at 265.

Defendants complain of numerous aspects of plaintiff's damage evidence as being misleading and inaccurate. But the accuracy of plaintiff's testimony is a matter going to its weight, not its admissibility. Ford Motor Co. v. Webster's Auto Sales, 1 Cir., 361 F.2d 874, 886.

Defendants contend that plaintiff's losses were the result, not of a conspiracy, but of its own bad business judgment and changes in the market and its methods of operation. There may well have been many factors which contributed to plaintiff's losses. But it is not necessary for a plaintiff in an antitrust suit to show that the conspiracy is the sole, or even the most substantial, cause of damage. It is enough for a plaintiff to get to the jury if he shows that the conspiracy is a substantial cause. Haverhill Gazette Co. v. Union Leader Corp., 1 Cir., 333 F.2d 798, 805-06, cert. denied 379 U.S. 931, reh. denied 379 U.S. 984; Perma Life Mufflers v. International Parts Corp., supra at 143-44 (White, J., concurring).

On pages 3518-3520 of the Transcript, this court adequately instructed the jury with regard to defendants' theory that any losses suffered by plaintiff were not the result of the alleged conspiracy and hence not to be included in any award of damages.

III.

The defendants make numerous contentions with respect to alleged errors and prejudicial statements made by the court in its instructions and with respect to the refusal of the court to give their suggested instructions.

The defendant, United Mine Workers, submitted 26 numbered requested charges, and the defendant, Consolidation Coal Co., submitted 74 numbered requested charges. Either of these sets of requested instructions, if given in toto, would have contained errors and would have been grossly one-sided, even though both contained a great many correct statements of the law. A court, in charging the jury, should not make statements of the law in the abstract, without any relevance to the issues to be decided, in order to avoid confusing the jury. Moreover, a court is not obligated to use appropriate and applicable suggested charges if it gives a charge embodying the same rule but in different language. Tyree v. New York Central R.R. Co., 6 Cir., 382 F.2d 524, cert. denied 389 U.S. 1014; Westmoreland v. Memphis Transit Co., 6 Cir., 305 F.2d 71.

The charge to the jury must be considered as a whole. This court is of the opinion that the charge, so considered, favored neither the plaintiff nor the defendants and presented to the jury a sharp, clear issue for

their determination. This language from Cobb v. Union Railway Co., 6 Cir., 318 F.2d 33, cert. denied 375 U.S. 945, is applicable:

> "Flaws can be found in almost any charge by separating certain paragraphs from the whole to determine whether it gives the jury a correct understanding of the propositions which they are to decide and the pertinent principles of law which shall guide them in their decision." 318 F.2d at 37.

IV.

Defendants complain that the court in its instructions erroneously characterized the Protective Wage Clause to their prejudice and failed to give adequate instructions with regard to the Protective Wage Clause and the 80 Cent Clause.

By examining certain portions of a charge to a jury out of their context in the whole charge and in the trial, one can frequently find flaws. This is especially true in the case of such a protracted trial as this was. Therefore, as noted above, the charge must be considered as a whole to determine whether the substantial rights of the parties were prejudiced. Cobb v. Union Railroad Co., supra.

This court is of the opinion that the charge to the jury, taken as a whole, fairly and accurately presented the substance of the Protective Wage Clause. Any inaccuracies in the instructions were inconsequential and certainly rectified by the court's admonition to the jury: "You are not to accept what I may say (in commenting upon the evidence) as necessarily true." Transcript 3492.

Memorandum.

The Protective Wage Clause is capable of two reasonable constructions, and the one should be adopted which does not result in a violation of law. Lewis v. Pennington, supra; Ramsey v. United Mine Workers, supra at 412. Consequently, the jury was instructed twice that the contract between the United Mine Workers and the coal operators was not in itself unlawful. Transcript 3507, 3512. Nevertheless, the execution of the contract, including the Protective Wage Clause, was evidence in the case which the jury could consider along with all the other evidence.

V.

It is contended that the court failed to instruct the jury properly on the defense of in pari delicto. The most recent decision by the Supreme Court on this defense is Perma Life Mufflers v. International Parts Corp., supra, which produced six opinions, none of which was supported by a majority of the Court. The instructions in the instant case follow what appears to be the law as reflected, however obscurely, in *Perma Life Mufflers,* namely that if the plaintiff was a co-initiator of the conspiracy and equally responsible therefor, plaintiff is not entitled to recover for the period that it remained a party to the conspiracy. Transcript 3515-3516. It is doubtful that an instruction on the defense of in pari delicto should have been given at all. If anything, the instruction given was unduly favorable to defendants.

Memorandum.

VI.

It is contended that the court should have granted a mistrial during the course of the trial because of an improper contact between Mr. Harry LaViers, Sr., president of South-East Coal Co., and two members of the jury. The contact occurred one morning in the hotel coffee shop when the head waitress seated Mr. LaViers at a table next to one occupied by the two jurors. They engaged in brief bits of conversation, but nothing was said about this lawsuit and Mr. LaViers did not intentionally attempt to curry favor with the jurors. Transcript 1770.

The determination of whether irregularities or alleged misconduct of this nature should require a new trial is a matter within the sound discretion of the trial judge. United States v. Van Buskirk, 6 Cir., 304 F. 2d 871; Thomas v. Nuss, 6 Cir., 353 F. 2d 257, 259. The court should not grant a new trial because of an irregularity not attended with any intentional wrong where it appears to the court's satisfaction that the interests of none of the litigants were prejudiced. California Fruit Exchange v. Henry, W.D.Penna., 89 F. Supp. 580, affirmed 184 F. 2d 517. This court is satisfied that the contact between Mr. LaViers and the two jurors did not influence the verdict in any way.

The case of Noble v. McAllister Dairy Farms, 52 Ohio Ops. 52, cited by defendant Consolidation Coal Co., is factually distinguishable from the instant case. To the extent that the statement of law from *Henry,* supra, set out above, conflicts with any of the broad propositions stated in *Noble,* I decline to follow *Noble.*

VII.

The defendants allege error in failing to sustain their challenges of juror Arnspiger. This juror had written a real estate bond for a stockholder and retired director of plaintiff (or for his son) but was not personally acquainted with him. He stated that this fact would not influence him.

The competency of a juror is for determination by the trial court, which is vested with a wide discretion in determining competency. Cox v. General Electric Co., 6 Cir., 302 F. 2d 389, 391. In view of the circumstances surrounding Mr. Arnspiger, it was within the court's judicial discretion to retain him on the jury. The dictum in Commonwealth Coatings Corp. v. Continental Gas Co., 37 L.W. 4037, decided November 18, 1968, does not require a new trial in this case.

In sum, this court is of the opinion that the verdict was supported by competent evidence and that the trial was free from any error which would warrant a new trial. The motions of the defendants for a directed verdict and for judgment notwithstanding the verdict, or for a new trial, should be overruled.

An order in conformity with this Memorandum is this day entered.

MAC SWINFORD, Judge

A True Copy Attest

DAVIS T. MCGARVEY, Clerk
U.S. District Court

By HELEN M. JENNIUE

APPENDIX C

[Appendix C consists of the District Court's Instructions to the Jury in *South-East Coal Company v. Consolidation Coal Company and UMWA.*]

Instructions to the Jury

[1824] Now, I feel it is important to give you some explanation of the background of the coal industry in Kentucky, and very briefly. I do not want to detain you any longer than necessary in this charge, but I want you to be able to feel that you can do so, to decide this case today. You are not under any compunction to do so. You may come back tomorrow or as many days as you think is appropriate.

I realize it has taken a long time to try it. There is quite a lot of evidence, both from the witness stand and by way of depositions and transcripts; quite a number of exhibits that you will want to consider, but the issue in this case is very narrow and before I conclude my charge to you, I will draw the issue very sharply for you. You will not have any difficulty in recognizing what it is that you have to decide.

I believe, in the light of all the evidence and all the inferences which may be drawn from it, that you can arrive at a fair and just verdict.

The coal industry is a fascinating and interesting industry. As has been brought out here in the evidence, it

goes back a long way. The United Mine Workers, or the workers, who are the men that produce the coal, who go into the pits and actually produce the coal and the operators who have risked their capital in the industry, have made a distinct contribution to our whole economy.

[1825] They are entitled, as the law provides, to be protected in those rights. They are entitled, both as the plaintiff here is entitled to be protected, and the defendants are entitled to be protected, and so long as they are all observing the law and the responsibilities of their business, then the economy will be protected itself, and the people of the United States and of the world, because this is a world proposition. Much of this coal that we dig here in Kentucky is exported and it is, after all, a world proposition. But all of us will profit by a healthy condition of the coal business.

Eastern Kentucky has a coal field and western Kentucky has a coal field, which we are not concerned directly in this lawsuit, and those of you who have never visited these coal fields or any coal fields, some of the language used in this trial might be a little obscure and you might not feel that you clearly understand just what it is all about when they talk about tipples and "sweetheart contracts" and "coal contracts" and production and organization of coal companies and organization of coal mines.

I am going to very briefly explain some of these things to you.

A "tipple" is the place where the coal comes out of the ground and where it is loaded into cars to be hauled to market. Now, you understand the old system, many

years ago coal was brought directly out of the ground, placed into coal cars and hauled away by the railroad companies. It was sold as it was, either good, bad, or indifferent, but you understand modern conditions, coal is brought out of the ground and a great portion of it is loaded into trucks and it cannot be sold as it may appear or at least a part of it cannot be sold as it comes out of the ground, but it must be cleaned.

This is a highly competitive business. There are other coal fields in other States and other places and foreign markets even, and so the coal must be cleaned and [1826] taken care of and made more salable. So, when we speak of a cleaning plant, sometimes the terms are interchanged — "tipple" and "cleaning plant" are interchanged — and to the lay people it may not be clear.

But these cleaning plants are tipples where this coal is brought and put into the cleaning plant and cleaned and graded and then loaded into freight cars or trucks for sale. This is a major proposition. It is not just a matter of — you may have driven through the mountains of Kentucky and seen a little wooden tipple, and somebody says "There is a tipple halfway up the mountain," where coal is being brought out and being brought down by a conveyor system, which, in itself, is still in operation.

But, under modern methods, it is frequently required that this coal be processed and that these coal-cleaning plants or washing plants, as they are sometimes called, are involved in the production just the same as digging the coal or bringing it out or blasting it out or by stripping methods or whatever it may be.

The cleaning of the coal or processing of the coal is a part of the coal production. So, when I say "tipple"

as used here, I mean the last place that the coal is before it is hauled to market.

Now, you have also heard the term here" sweetheart contract." I am not sure that you clearly understand. It sounds very romantic, I am sure, but in this sense, where there was an agreement and there was an agreement under this 1958 coal wage agreement, that the United Mine Workers entered into this contract nationwide thing, as they claim, to make everyone who produced coal to pay what is known as a Welfare Fund. The Welfare Fund was 40 cents that was put on every ton of coal that was produced by the miners.

Now, that Welfare Fund went into the retirement plan and various other social benefits to the miners themselves, the building of the hospitals that some of you may have some experience and knowledge of, or taking care of these [1827] miners and their families in illness and their general welfare to see that they were given a better condition of living in that respect.

So that Welfare Fund or that 40 cents was an attachment on each ton of coal that was produced, and naturally as is a business arrangement, cost production is included and involved in fixing the price of the coal.

So that cost was added to the retail or wholesale price of the coal from the producer to the wholesaler or retailer. Now, that had to be, as it is contended, on a national basis in order for these companies to compete with each other from the various coal fields in the United States.

The United Mine Workers is not just a Kentucky organization, it is a national organization that was

begun back in 1890, as a combination of the miners for their self-preservation and for the benefits which they felt by union they could have which as individuals they might not have.

So that national wage agreement included not only the wages, not only the standards which were set by the contracts that had been in effect since 1950, but in 1958 it added this Welfare Clause to it. That Welfare Clause is the thing that you have heard referred to as the Protective Wage Clause. They have used that term. I sometimes think lawyers are so familiar with their case that they may not realize what they say doesn't always have significance to jurors.

But that Protective Wage Clause in the 1958 contract was to the effect that the operaors would not handle coal from any company that was not under that contract.

Now, that is what it means in short, that this Protective Wage Clause — take the Consolidation Coal Company, and use it as an example. It produced coal. I don't know whether it does now or not. It used to. It used to own mines in Eastern Kentucky. I am not sure that it does own any now. I believe it does own some mines in Virginia. At any rate, it used to be a big actual miner of coal in Eastern Kentucky. It sold its own coal and it also bought coal and resold it. It bought coal from other [1828] producers, independent producers, such as it was. It bought coal from captive mines. In other words, it was in the coal business, in the coal production business and the coal handling business and the coal sale business. So there were other companies such as this, and this contract provided that

these companies would not handle anybody's coal unless it was a coal producing company that had signed one of these national wage agreements with the United Mine Workers.

You have heard the term used here "captive mines." Well, a captive mine is a mine, just to use an example, like Inland Steel at Wheelwright. They have a big tipple there. I think that tipple cost five or six milion [sic.] dollars. They have a big cleaning plant. Those things are so enormous we think of a building costing four or five million dollars, but we have got a great big building, and that is what this is.

As a matter of fact, I have seen that tipple there at Wheelwright, and it has a provision that picks up a freight car, the whole freight car and shakes it just like that, and that is a modern method which is used in the production of coal for sale.

So those companies, like Inland Steel, or like other companies that use a lot of coal in the production of stel, own their own mines, but very frequently there are types of coal or kinds of coal that they cannot use in their manufacturing process, or they may have for a time being an overproduction. So they sell that coal and they might sell that coal, as it has been testified to here, by some of the witnesses, to companies as the defendant, Consolidation Coal Company, for resale. Sometimes the captive mine owners have to buy coal, and it just depends on the circumstances and the particular need which might arise at a given time. But that is what is meant by a captive mine. That is a mine that is not in the business primarily of producing coal for sale, but is in the coal mining business for its own coal, and to use

its own coal and only sells its oversupply, or that which it cannot for some reason or other use in its business.

[1829] Going back to this question of the sweetheart contract that I brought up a few minutes ago, a sweetheart contract is a special dispensation to a coal producing company because of a circumstance which that company, says, "I cannot survive if I have to pay this 40-cents Welfare clause provision, if I have to observe it. I cannot pay that much additional and have that much additional price on my coal and sell it," or, "I cannot meet some of these other conditions," whatever they might be, some of the conditions maybe as to the wages, the cost of labor, or for some reason a company or an individual will say, "Well, I cannot sign that contract."

Then it is contended that the union, who is seeking to have these contracts executed by all coal producers for the benefit of all of the miners as a group, will say to that person, "Well, you go ahead and sign it anyway. We won't insist on it." In other words, it is showing favoritism, for one reason or another, to a particular group or individual group of companies or individual coal producers.

Now, that is what they mean when they say a "sweetheart contract."

As I say, as it has been brought out here, it is quite an educational thing to me, and I am sure it is to you, this development which we have seen here from this witness stand in the progress of this case. This coal is sent from Kentucky to the northwest, up to what is known as the Lake Region, to Minnesota, all up into the Great Lakes Regions. It wasn't brought out here,

but I would assume wherever there is steel mills there is a demand for it, and where there is other industry that has to have energy from heat, that coal is used and sold.

It was the business of Consolidation Coal Company, the defendant here, to acquire that coal from producers and transport it and sell it, as it would seem from our case here, primarily up in the northern part of our country. So that is the matter which up to this point has been brought out here.

[1830] As I said before, I don't want you to think because of this length of time that we have had to try this case, the number of witnesses and the number of exhibits, and the number of figures, the hundreds of figures used here, and the testimony that has been read here for hours at a time from transcripts and from depositions, that you are so confused that you don't know what it is all about. It does sound like such a magnanimous big operation that it is hard to find out. But the issue in this case, notwithstanding all of that, is very, very sharp. I assure you that before you go out of that jury box that you will understand what it is you have to decide.

Now, you will have to apply your recollection, as far as you are capable of doing it, to what was said.

In other words, you can't remember all the details and everything that was said, but you gather from these witnesses, from their demeanor, from the things they say and the inferences that may be drawn, one after another, and from these depositions, an idea about this case. You get an idea. There is an atmosphere

about a lawsuit, and you are not expected as jurors to just take it step by step by step. That is an impossibility.

So you are to use your recollection of that evidence. You are to get an idea from the whole picture of this thing that this case should be decided one way rather than another. Now, that is a common-sense approach to it. By discussing it together, you arrive at a fair and just verdict, and I am sure you can do that.

I am depending upon you. I am trusting you to do it. You don't realize possibly, but this court is the most important thing in the world. What you do here in this case is going to reflect credit or discredit upon this court. To me there is nothing that compares with it in the whole idea of free government, that a procedure should be had where citizens come in and ask their fellow citizens under defined rules of law and under a Constitutional guarantee of justice to decide an issue of fact. It is just as simple as [1831] that. But they are dependent upon each of those jurors to have an understanding and appreciation of the seriousness of their job, not that it is impossible, it isn't, but that they should have an understanding and an appreciation.

What you decide is striking at the very foundations and roots of our government, because if justice fails, nothing else matters. To me there is nothing to compare with the responsibility that rests upon me as the presiding Judge of this Court, upon these lawyers, who are officers of the Court, upon you, who are the jurors, who actually, after all, are going to make the decision.

So, consequently, each of you carries with you the integrity of this Court when you go into your jury

room. I will enter the judgment. But my judgment must be based upon your verdict. If your verdict is unfair or unreasonable or unjust, then my judgment will be that way, and that will be my responsibility. If your verdict is fair and just, it is a reflection upon your intelligence, upon your integrity, and upon the ideals which we think are sacred in the administration of justice.

Now, your verdict must be unanimous. By unanimous verdict, it means it must be the verdict of each juror. You cannot arrive at your verdict by holding a primary election in the jury room or taking a majority or any other percentage of the number of jurors. It must be the verdict of each juror. Each juror must make up his or her own mind as to what the verdict should be.

That, however, does not mean to recommend or aggrandize; doesn't mean that you are to go into the jury room and take an uncompromising view without first considering the reasons, recollections, and arguments of your fellow jurors.

You may be assured, and I don't suppose any of you ever knew each other before, but you may be assured from me that each person on that jury is just as anxious to be a fair juror as you are. No one has any ulterior purpose of [sic.] motive.

[1832] What each one wants to do is, I am sure, to decide this case and reflect upon this Court and to do justice and to reflect credit upon himself or herself as a juror.

I have never served on a jury, but I have known a lot of people who have, and I have had them tell me

sometimes you go to the jury room and some one or two or more of the jurors will immediately announce what the verdict should be, and that everyone will have to agree with them or "we will stay here all day" or "all night," or some other such extravagant statement, mistaking, I am afraid, hard-headedness and stubbornness and stupidity for strong-mindedness.

So, I don't want you to fall into that trap. I do what you to exercise certain of your own free will as to what the verdict should be and stand up for your theories and argue about them, but realize that the jury is composed of twelve people, not two or three or seven or nine, with the idea that twelve disinterested citizens of this district can take a given set of facts and, with certain rules of law, can apply those rules of law to those facts and come up with the right answer.

I don't know why there are twelve people on the jury. I don't know why there are twelve of so many things, but that figure has come on down through the corridors of time, this idea of twelve.

There are twelve months in the year; Christ had twelve disciples; and there are twelve in a dozen of oranges — and I don't know why that rather odd number exists, but it has carried in our whole historical understanding of things and plays a significant part.

Twelve months in the year, various things that are brought in to us, that number.

So, I hope that you will, when you go to the jury room, realize after all this must be a relative give-and-take matter. They didn't just ask one person to decide the case; they asked twelve.

[1833] I would not require you to make a verdict, I couldn't if I would, and I wouldn't if I could but I do want to impress upon you the importance of making a verdict, if you feel that you can conscientiously do so.

This case has taken this length of time to try. I don't want you to sacrifice any principle on an expedient, and I am sure we have to be practical about things, and it has taken a long time to try; and unless you can make a verdict, we will have to go through this again—which is expensive, both in money and in time, and an awful lot of people, including jurors, as you know, who would have to sit here and hear it all again.

So, if you feel that you can reasonably and honorably do so, I hope that you will return a verdict. After all, it can be decided, and I am sure that you realize that and will do so, if you feel you can conscientiously make a verdict.

Now, in the Federal Rules—which is not true in the State courts, and possibly some of you have served on juries in State courts; in the State court, the judge gives written instructions, in Kentucky, and the lawyers have those instructions and use those instructions many times, very frequently in arguing their case to the jury, instructions in writing—in the Federal Courts the case is concluded, insofar as the introduction of evidence and the arguments of counsel are concerned, and then the trial judge gives a charge to the jury, as I am doing now, and gives the law and the rules of law which must guide the jury in determining the case.

It is the privilege of the judge, in so doing, to comment upon the evidence.

Now, I do not propose to, and certainly would not presume on you to undertake to review all of this evidence in this case. I couldn't do it if I wanted to. I can't remember it that well, and I would not presume upon your time or your patience by undertaking to go into a long exhortation and recitation of what various witnesses may have referred to or said during this trial.

[1834] But, if I should comment upon the evidence, if I should make reference to it, you are not to consider what I may say as all of the evidence. You are not to consider what I may say as all of the important evidence. You are not to consider what I may say as all of the important evidence on a given point.

You are the triers of the facts and it will be for you to recall what that evidence was and draw your own deductions and inferences from it.

You are not to accept what I may say as necessarily true. I certainly would not intentionally make a mistake, tell you or give you a wrong statement, but you are the triers of the facts, and it will be for you to recall what that evidence was and what proper inferences may be drawn from it.

Now, this is a damage statute. Plaintiff here, Mr. LaViers and his son and his company, South-East Coal Company, which has been described to you here in some detail, are seeking to recover damages for an alleged wrongful act, committed, as they say, and as they claim, by the coal operator, Consolidation Coal Company, and the coal producer—that is, the laboring organization that brought the coal out of the ground—and that, as Mr. LaViers contends and claims, that he has been damaged by that arrangement which is, according to all al-

legation, wrongful and unjust and unlawful arrangement, and he is entitled to recover the losses he has sustained as a direct result of that unlawful agreement between these two defendants.

Now, in order to recover, the South-East Coal Company must sustain the burden of proof; in other words, if no proof was offered, there would be no judgment for the plaintiff. It is his responsibility to offer proof to establish the facts that he claims.

And the defendant has the right, as you have seen here, to offer proof to contradict those facts or to explain those facts or to justify its conduct, which may have been brought out by witnesses for the plaintiff in support of its allegations.

[1835] But it is the responsibility of the plaintiff to sustain this burden of proof. Now, by "burden of proof," it doesn't necessarily mean the greater number of witnesses. Sometimes the burden of proof in lawsuits can be sustained by one witness as contrary to fifteen on the other side, and so you are not to confuse the idea of "burden of proof" with numbers of witnesses or numbers of depositions or other articles of evidence that might be offered.

But it must convince you, before this plaintiff may recover, it must sustain its burden of proof by proving every essential element of the claim, by a preponderance of the evidence.

Should it fail in its proof, under this rule you should find for the defendant.

To establish the preponderance of the evidence means to prove that something is more likely so than

not so; in other words, the "preponderance of the evidence" means such evidence, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely to be true than not true.

In determining this fact, you should consider the testimony of all witnesses, both those who appeared on the witness stand and those who gave their testimony by deposition, or whose testimony was offered by transcript, regardless of who called the witness in other words, consider all the evidence, not just the plaintiff's evidence, not just the defendant's evidence, but consider all of the evidence.

You are to give consideration to all exhibits received in evidence, regardless of who may have produced them.

Such an anti-competitive conspiracy — and that is what this is; in other words, it is claimed by the plaintiff here that this arrangement was restraining competition, was monopolizing the field of coal production, and that you either had to belong to it or you were likely to be put out of business or suffer substantial financial loss — and [1836] such an anti-competitive conspiracy as claimed by the plaintiff must be established by clear proof.

Now, that is the law.

On this part of the case, I want you to give consideration to that in connection with the other things that I shall advise you. Now, this is based upon a claim by the plaintiff that the defendants have been guilty of a

violation of law and are, therefor, answerable to this plaintiff in damages under the provisions of the law. That is somewhat repititious of what I just got through saying to you, but I may appear to be a little repititious. It is rather an involved matter to get all I must say to you into these instructions, and sometimes I may appear to be repititious for fear that I may have overlooked some matter and repeat it.

The law on which this claim is based is known as the Sherman Anti-Trust Law. This anti-trust law goes back to 1890. It was passed during Harrison's administration in 1890. It didn't have any teeth in it until the Clayton Act was passed in 1912.

The Clayton Act provides for the punishment for violation of this law, and so the Sherman law is an old law, and so is the Clayton law, but about twenty-two years apart in their enactment.

The right to invoke the provisions of the Sherman Anti-Trust Law is provided in what is known as the Clayton Act. Don't get confused, members of the jury, with the Clayton Act and Sherman Anti-Trust Law — all these things that sound so legal.

Don't think, "Well, I don't quite understand that," because I will clarify the whole thing before you leave your jury box.

The pertinent part of Section 1 of the Sherman Act is as follows:

"Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

[1837] The pertinent part of Section 2 of the Sherman Anti-Trust Act is as follows:

"Every person who shall monopolize or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of the trade or commerce among the several States or with foreign nations shall be deemed guilty of a violation of law."

Section 15 of the Clayton Act provides that: "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States."

I am not reading from the Act now; this is my own copy. A conspiracy between employers and labor founded with the intent of driving competitors out of business is a violation of the Sherman Antitrust Law.

Now, as I say, this Sherman Antitrust Law and Clayton Act and these things sound very legalistic. But it is a simple proposition. It is a matter for the protection of the people in their free exercise of their will, and I am sure you can well recognize, if there had been no antitrust laws, probably none of these people here in this courtroom now, in this lawsuit, would have been in existance. If there had been no antitrust law, this country would have been like they said Japan was at the beginning of the second World War. In Japan everybody worked for one of seven big corporations, whether you were a doctor, lawyer, dentist, teacher, or whatever you might be. You had to be working for one of seven big outfits, because they had monopolized all the fields that there were, and there was no possibility of an individual competing in those fields. So we can understand this

Sherman Antitrust Law, which is for our own protection and the protection of all of these litigants, just as well on one side as the other, meaning that the Government said, the people of the United States said, by enacting these two laws, the Sherman Act and the Clayton Act, that you have no right to go into a field of endeavor and enter into agree-[1838]ments with each other and monopolize the fields so that there is no competition, because when there is no competition, then you can name your own price. In other words, if there was only one oil company in our country, instead of numerous oil companies — they may have interlocking directors, or something of that kind, and I am not going into that now — but if there was only one oil company and you could only buy gasoline when you drove up to a filling station from one company, they could put the price at anything they wanted to, either take it or leave it. You had no place else to go. So that is what these laws are. That is what the purpose of it is. That is what the enactment was entered into with the idea of protection and leaving a competitive field in all industry and in all business.

Now, the plaintiff here is claiming that these two institutions entered into a conspiracy with each other to monopolize the coal industry.

In order to establish a conspiracy or unlawful arrangement as claimed by the plaintiff in this case it is not necessary that the plaintiff should offer proof of a direct arrangement or executed written contract that they are entering into a conspiracy.

It is not necessary that the agreement, if any, was the result of formal action on the part of the defendants. The real question to be determined is whether or not

there was a meeting of the minds or a common understanding and purpose in the requirement of the execution of the labor agreement with the intention of doing injury to the plaintiff.

You are instructed that if you return a verdict for the plaintiff it must be against both of the defendants. In other words, you cannot return a verdict against one of the defendants and not against the other. Under the record of this case, they are either both guilty or neither of them is guilty of the charges made by the plaintiff.

[1839] To bring this matter down to this particular case, and the evidence, it is the plaintiff's claim here, admitting there is a contract, they did enter into a contract, but it is the plaintiff's claim here that this contract between the defendant union, the coal producers, the miners, that beginning in 1950 they had what is known as a collective bargaining arrangement, the miners and all those engaged in the production of coal.

Now, the law does not make it unlawful for them to combine for the purpose of making a union for the purpose of protecting their rights and for having a bargaining agent, so you are not to consider because the union is composed of a great many miners, all of the miners in this Eastern Kentucky who are members of it, that of itself is not unlawful. The courts have expressly said so.

The law has expressly said so in what is known as the LaGuardia Act that was passed by the Congress. That is not unlawful.

But in 1950 they entered into a contract using the United Mine Workers, and under the law they have a

right, the workers have a right to have a bargaining agent.

In other words, it used to be if you ran a coal mine you hired Dick, Tom and Harry as they came up to the window, and you hired them and gave them whatever you could hire them for, and whatever they would agree to take, and you hired them as individuals.

Then under the national law and under the national policy, the labor laws, as we have produced under what is known as the Labor Act, and the LaGuardia Act and these other Acts of Congress, they were allowed to bargain collectively. They didn't hire one man for so much and another for so much, but the miners and other workers in other industries were allowed to bargain collectively and to select a bargaining agent.

Now, these miners in this field selected the United Mine Workers and joined the United Mine Workers, and had [1840] the United Mine Workers as their bargaining agent, and so their agency through its leadership met with the coal operators, the producers, such as the Consolidation Coal Company here, and others of similar type, and entered inot [sic.] a contract in which it said all of the miners who work for this company will get the same thing, and that we will not hire anyone who is not a member of your union. That is what is known as a closed shop. We will not let non-union members work in our mine. We will agree to pay our workers with this contract so much, so many benefits, and various things.

Now, that went into effect in 1950. It was, I believe, a two-year contract. Anyway, however long it was to last, it had to be from time to time amended, and was

amended from time to time until the contract of 1958. The 1958 contract had this Protective Wage Clause which they said added an additional clause, that they will not purchase coal from any producers that are not under the 1958 contract, and they entered into that agreement with the Defendant Consolidation Coal Company.

The plaintiff, South-East Coal Company, signed that contract, and it is shown here that Mr. LaViers, who was the president or officer in that company, had gone along with that, whether wanting to or not. It is said that he did do it. I believe he testified to that. And that contract provided for the Welfare Clause.

It produced a lot of confusion in the industry in the eastern part of Kentucky, the miners insisting that all coal operators should sign this contract and that all of them should have the same benefits, both the big companies and the little companies, the big operators and the little operators, and it caused a great — I don't want to go back to the instances which maybe you recall having read — but there was quite a lot of confusion in eastern Kentucky growing out of the efforts of the UMW to have all miners sign this agreement. That is this agreement, in 1958, containing this Protective Wage Clause.

[1841] Some of the contract—or some of the operators said they couldn't sign it, wouldn't sign it. Problems arose from that. They sought to operate then by this non-union labor and some union labor and some who were willing to work without a contract.

But the majority of the miners said, "We will not work without a contract," and so it created considerable

difficulty. Now, that is where this "sweetheart" contract business came into being.

In order to go on, and miners want to work, they don't want to lay off, they may get some benefits when they are not working but they want to work, and operators want to work, and everybody wants to work.

It is just a question of how much you are going to get paid and how many benefits, as workers, you are going to have or what consideration the operators are going to have.

So, that continued under this contract. These "sweetheart" contracts, where they signed the contract and were told by the UMW that they wouldn't be enforced, that they wouldn't try to collect that off of them, and that created some confusion, some losses.

Mr. LaViers said, as he testified, he paid in several hundred thousand dollars on two or three or more million dollars into the Welfare Fund, and that he was unable to continue with it because his business could not afford to carry that and he, therefore, notified the Consolidation Coal Company, which was his sales agency, the purchaser of his coal, primarily, or handler of his coal, and he notified the Union that in sixty days he would cancel the contract, which was provided in the provisions of the contract, and he did that and proceeded then to work or to operate these mines with non-union labor, or those who were members of the Union who were willing to work or cross the picket-lines or whatever efforts were made on behalf of the UMW to discourage his operation.

[1842] Now, it is not the signing of the contract between the UMW and the Consolidation Coal Company.

There is a written contract, the one of 1958 and one of 1964. Mr. LaViers cancelled his contract in 1962 and was not operating under a wage agreement or any contract with the UMW.

In 1964 another contract was written in which the provision was that the parties said the Welfare Fund must be paid on each ton of coal mined and that those who had not been operating under the contract would pay 80 cents a ton.

Mr. LaViers here says, admitting that contract to be a lawful contract between the parties, that under the terms of the anti-trust law their arrangement monopolized the field, and that he was unable to meet the conditions of the contract and to compete with this, as he says, "unlawful arrangement" between the workers and management, represented by the UMW and the Consolidation Coal Company in this lawsuit.

The thing which you will have to decide and which I will probably refer to again, there is nothing unlawful about that contract in itself; but if it was entered into with the intention on the part of the signatories—the two defendants here—to injure the plaintiff, if they had that in mind, that "we are going to go into this contract because we know it will put South-East out of business; they can't meet the conditions; we are too big, too strong, and they cannot compete with us, cannot get miners to work for them, and they cannot sell their coal on the market because they do not have sufficient sales agency, so we will deliberately enter into this and they can't meet it; we will thereby profit by putting competitors out of business or seriously hampering his operation."

So, the issue is: Did these two signatories have that thing of putting the South-East Coal Company out of business in mind, the time they signed the contract?

[1843] Conspiracies are seldom capable of proof by direct testimony and it is settled law that they may be inferred from the action of the parties.

Circumstantial evidence of the existence of the conspiracy may be sufficiently strong to raise a factual question on which you may base your verdict, even though there is no direct evidence that a conspiracy existed.

As jurors, it is your function to observe the witnesses while testifying and to appraise their credibility, to draw inferences from the facts established; to resolve conflicts in the evidence and to reach ultimate conclusions of fact.

I don't know whether I have given you the definition of a conspiracy or not. I have it here some place; anyway, I will give it to you. If I have to repeat it, I will ask your indulgence.

A conspiracy sounds like a legal term, a legalistic term. It is a common-sense, every-day word, as a matter of fact.

Conspiracy, I think, is pretty well understood by each of you, generally understood, but in this case a conspiracy is an agreement between two or more persons to do an unlawful and commit an unlawful act or commit a lawful act in an unlawful way. In other words, it is simply this: Two or more people, or in this case, corporate entities, agree to enter into an arrangement to put the plaintiff out of business, or seriously hamper

its operations, which is, under the law, a wrongful act, for which the defendants may be held accountable in damages.

The South-East Coal Company claims—I have it right here. I am sorry. I was just about to read it when I took off and said it, but I will read it again.

The South-East Coal Company claims that it has been injured and thereby damaged by the unlawful joint acts of the defendants, United Mine Workers of America and the Consolidation Coal Company. This alleged wrongful action is that the two defendants had been guilty of a conspiracy against the plaintiff.

[1844] A conspiracy is an arrangement or an agreement or plan between two or more individuals or, as in this case, corporate entities, to commit an unlawful act, or to commit a lawful act, in an unlawful way.

In other words, the plaintiff claims that this coal company, through its officers and agents, had a plan or an agreement, the officers and agents of the labor union, to require all coal producers in Eastern Kentucky coal fields to execute a contract with the United Mine Workers requiring the payment of 40 cents a ton for each ton of coal produced by the coal operator, with the knowledge that the plaintiff could not meet the requirement of the 40 cents per ton, and economically survive in the coal-producing business.

You are instructed that if you believe there was an industry-wide collective bargaining agreement, whereby employers and the union agreed on the wage scale that exceeds the financial ability of some small operators, including the plaintiff, to pay, and that the agreement was made for the purpose of forcing some employers, in-

cluding the plaintiff, out of business, injuring its business, and you believe that the defendants, the Consolidation Coal Company and the United Mine Workers, deliberately entered into and participated in such an arrangement, and that the result of such an arrangement was the sole cause of damage, if any, to the plaintiff, then you will find for the plaintiff.

If you do not so believe, you will find for the defendants.

The contract about which you have heard so much during the introduction of evidence was executed originally in 1950, between the United Mine Workers as a bargaining agent for its coal miner membership. This contract is referred to in the evidence as the National Bituminous Coal Wage Agreement of 1950. This contract was re-executed from time to time, with varying changes, and finally culminated in the contract effective April 2, 1964, which is the bassi [sic.] of this lawsuit and is the contract which the plaintiff here says that it is unable to comply with.

[1845] This contract has this clause:

"During the life of this agreement there shall be paid into such Fund by each operator signatory hereto the sum of forty cents per ton of two-thousand pounds on each ton of bituminous coal produced by such operator for use or for sale. On all bituminous coal procured or acquired by any signatory operator for use or for sale, that is, all bituminous coal other than that produced by such signatory operator, there shall, during the life of this agreement, be paid into such Fund, by each such operator signatory thereto, or by any subsidiary or affil-

iate of such operator signatory hereto the sum of eighty cents per ton of two thousand pounds on each ton of such bituminous coal so procured or acquired, on which the aforesaid sum of forty cents per ton had not been paid into said Fund prior to such procurement or acquisition."

In other words, it is claimed by the plaintiff that the defendants fixed the wages and Welfare Fund royalties so high in 1950 by the National Bituminous Coal Wage Agreement and the amendments thereto that the small companies, including this plaintiff, could not pay them and continue to operate successfully.

And that the defendants knew that the small companies, including the plaintiff, could not pay the fixed wages and Welfare Fund royalties, and that thereby the trade and competition offered by the small companies, including the plaintiff, to the larger coal producing companies, including the defendant Consolidation Coal Company, would be eliminated by putting the small companies, including the plaintiff, out of business.

It is for you to determine from all the evidence and all reasonable inferences which may be drawn from the evidence whether or not these defendants had such an agreement or meeting of the minds for the intent and purpose of unreasonably restraining trade and monopolizing the coal industry in the eastern Kentucky locality by driving [1846] the small companies, including the plaintiff, out of business.

You are instructed that the execution of the written contract is not of itself or per se a violation of the law.

In order for the contract to be unlawful you must believe that its execution by the defendants was for the

purpose and with the intention, among other things, of destroying or injuring the business of the plaintiff.

A union may make wage agreements with a multi-employer bargaining unit and may, in pursuance of its own union's interest, seek to obtain the same terms from other employers; but a union forfeits its exemption from the anti-trust laws when it is clearly shown that it has an agreement with one set of employers to impose a wage scale on the bargaining unit.

One group of employers may not conspire to eliminate competitors from the industry, and the union is liable with the employers if it becomes a party to the conspiracy.

This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours, or other conditions of employment for the remaining employees and employer in the industry.

It is a legitimate aim of any national labor organization to obtain uniformity of labor standards, and it may be a consequence of such union activity to eliminate competition based on differences in such standards.

This, however, does not mean that the union and the employers in one bargaining unit are free to bargain about wages, hours, and working conditions of other bargaining units or to attempt to settle these matters for the entire industry.

The union has a duty to bargain unit by unit in order to best serve its obligations to its members.

The Union should retain the ability to respond to each bargaining situation as the individual circum-

stances might warrant without being strait-jacketed by some prior agreement with favored employers.

In other words, the plaintiff here contends that they had given him, as a smaller operator, certain concessions and [1847] not require [sic.] the stringency of the contract which they had with all the operators who were able to live under that contract, and that he could have survived and, to the best interests of himself and members of the UMW who worked for him.

Wage differentials should not be the basis for affording to one operator a competitive advantage over another.

To sum up what I have said, if you believe from all the evidence and all reasonable inferences that might be drawn from the evidence that the defendant Consolidation Coal Company, as the employer, and the defendant United Mine Workers, as the employee, with the intention of putting the plaintiff out of business, entered into an industry-wide agreement that exceeded the financial ability of the plaintiff, then you are instructed that the defendants are guilty of violating the anti-trust laws, and that you should find for the plaintiff.

Now, the defendants here say that, admitting all of these things for the sake of argument, as we put it, whatever damage came to the plaintiff, that he was a part of it.

He can't claim anything against the coal operators because this arrangement which they had with the UMW had his approval and endorsement, that he was a member of the BCOA—Bituminous Coal Operators Association—that drew up the contract, and that he was a spon-

sor of it and, therefore, if he got hurt by it, if it was wrong, he was helping in a wrong, "impari delicto" they call it. That is equal guilt.

A person who is of equal guilt cannot claim that he has been wronged by other people who assisted or collaborated with him on the same project.

The defendants have entered the defense of "in pari delicto"—this means that the defendants say that if an unlwful conspiracy existed, plaintiff was equally responsible with defendants in the formation of said conspiracy.

Under this defense, the Court charges you that if the plaintiff was a co-initiator of the conspiracy and equally responsible therefor, plaintiff is not entitled to recover [1848] damages for that period of time that the plaintiff remained a party to the conspiracy.

Now, a person may be a party to such an arrangement, be "in pari delicto," but he can withdraw from that. You are not once brushed with tar that you can't get rid of.

So, even though you may believe that he did do this, that he was in this arrangement, entered into this contract for the purpose of getting other operators out of business, yet, if you believe that he withdrew from and he got out of it and if you find that the defendants were more responsible than the plaintiff for the formation of the conspiracy, plaintiff may recover, even though it was a party to the conspiracy, even though South-East Coal Company was a party to the conspiracy.

Even though you may find that plaintiff was a party to the conspiracy and if you find that plaintiff

withdrew from the conspiracy and sought to avoid the effects of the conspiracy, it may recover damages arising in the period of the case subsequent to such withdrawal.

Now, the plaintiff contends two theories to this:

The plaintiff contends that the defendant United Mine Workers of America, in combination with the Bituminous Coal Operators Association, agreed to impose the wage and royalty scale set forth in the National Agreement and upon all operators regardless of their ability to pay, and that this was implemented by the Protective Wage Clause of 1958 agreement, which had the effect of restraining and monopolizing trade in the coal industry.

Plaintiff says that by this arrangement between these two defendants they undertook to impose a standard which the Consolidation Coal Company, because of its size and because of its wealth and because of its position in the coal productive and coal handling industry, could succeed with a, what the plaintiff said is a contract that the plaintiff could not sign and survive by reason of the circumstances connected with Consolidation Coal Company, as it was able to take shorter profits or whatever might be re-[1849]quired, finance itself better, and continue to make money and, as they say, did continue to make money after the execution of this contract; but, this company, being a relatively small operation, as compared with Consolidation Coal Company, could not compete with what he calls an unlawful monopoly.

Now, that is the theory of the plaintiff.

The defendants take the position that the contract involved is an ordinary contract between the employer and employee for their mutual benefit, and with no thought or any idea of making or considering any conspiracy to injure the plaintiff or any other coal operator; that any loss of business which the plaintiff sustained — this is the contention of the defendants, their theory of the case — that any loss of business which the plaintiff sustained was not the result of the contract of employment, including the cause, the Protective Wage Clause in the contract of 1958; was not the result of that contract of employment between Consolidation Coal Company and the United Mine Workers, as bargaining agent for the miners, but was the result of either mismanagement, overexpansion, economic conditions, or a combination of these, with possibly other circumstances, to none of which either of these defendants had any part.

That is the theory of the defendants here, that by building this cleaning plant at Irvine, that there was a significant miscalculation of its cost of construction, more than a million dollars it anticipated to cost; that it was 125 miles in haul from the mines to that plant, which was an additional expense and contrary to good coal production management, and that by loss of the sales of coal through no fault of Consolidation Coal Company, but through the failure of the plaintiff to exercise orthodox business acumen; that that is what caused this plaintiff to lose money, and that through its own failures and no reason to accuse either of these defendants to have committed wrongful acts; the financial problems of the plaintiff arose from its own [1850] actions and its own failure to exercise good business judgment in the face of advice on the part of Consoli-

dation Coal Company, according to Mr. Tucker, I believe, who was the witness — is that his name?

Mr. Combs: Cassidy.

The Court: The last witness who testified.

Well, anyway, one of the witnesses for the defendant, that he was concerned about the building of this tipple and this cleaning plant, and advised the plaintiff, through its president, Mr. LaViers, and possibly others, that importation from Canada and other places and the use of gas and oil was going to reduce the coal demands thirty-three and a third per cent from that locality, or more. Notwithstanding that, this plaintiff proceeded to its development and expansion, and that these defendants were in no way responsible for it. But, due to these circumstances alone, if he had any loss, it was caused by that.

Now, if you find for the plaintiff, that is, if you find, as I have tried to give you here, and I apologize again for being somewhat repetitious, I am sure, but if you find for the plaintiff, if you believe that South-East Coal Company has been damaged, under the conditions that I say, and that is these defendants are responsible, you will award it such sum, in damages, as you believe will reasonably compensate it for any loss that you may believe it has sustained by reason of the conspiracy, if any, between the defendants, not to exceed the sum of $3,100,000.

If you believe that the evidence does not clearly show a conspiracy, as I have defined that term to you, or if you believe that even though there was such a conspiracy, it was not the proximate or contributing cause of any loss which the plaintiff may have experienced in his business, you will find for the defendants.

In fixing damages, if any, you are not to fix a sum that is speculative or unrealistic or one that is not sustained by proof. That is, you must consider all the proof in the case on the matter of loss, if any, that was sustained by [1851] the plaintiff, and fix the amount of damages in accordance with that proof.

You must understand, however, that a matter of this kind cannot be established with exactitude and you must apply common sense, and common understanding of business activities, generally, and particularly in this case, as stated from the witness stand.

Now, I have drawn here a form of verdict which has the style of the case, "South-East Coal Company against the United Mine Workers of America and Consolidation Coal Company.

"We, the jury, find for blank." I have left that blank space there. If you find for the defendants, you will write in there the word, "defendants," and have your foreman — elect one of your number as foreman — and have your foreman sign the verdict for the jury. If you find for the plaintiff, you will write in there the word, "plaintiff," and the amount, one sum. You don't have to make any description of it or why or wherefor, one sum that you think is proper, as the verdict in this case.

Gentlemen, you may approach the bench.

* * * * * * *

[1915] The Court: Members of the jury, the Court has already charged you that the issue of alleged conspiracy in this case must be decided upon clear proof, that is, the

plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal, and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof. I want to give you that additional instruction as a definition for one of the terms I used in my charge.

My attention has been called to the fact that in my charge to you I stated that the Welfare Clause was incorporated in the contract between the union and the operators in 1958. That was an error on my part, and inadvertence. The Welfare Clause has been in the contract since 1946.

If I did say that, and counsel says I did, so I accept his statement on it, I will state that it was not in 1958 but in 1946 that the Welfare Clause was first incorporated into the contract.

Also I used the term, I believe, at one time of "closed shop." I referred to something as being a closed shop back in 1950, I believe. The contract provided for a closed shop. That was not correct either. That should have been union shop. It was an agreement, and the agreement was between the union and the operators, and I should have used the term "union shop" instead of closed shop.

Now, members of the jury, just a minute, please. Gentlemen, do you want to approach the bench?

* * * * * * *

[1916] The Court: I might say, members of the jury, that when I corrected my statement of using the

"closed shop" instead of "union shop," that it doesn't enter into this case one way or the other. I was merely using that as an historical background.

It is not any significant thing in the case at all. I am sure you will know. But I don't mean to emphasize it here [1917] at this time, because it has no bearing whether it is "closed" or a "union shop," on the issues to be determined here.

* * * * * * *

During the recess, bear in mind all admonitions. Don't discuss the case. Don't permit anyone to discuss it with you or in your presence or make up your minds about it in any way. Don't read any newspaper accounts or listen to any television or radio or any news media of any kind.

Avoid, insofar as you can, any persons that might inadvertently, either purposely or unpurposely, make any statement or reference about this case.

Don't talk to any members of your family. That is always an admonition, because I recognize that that is one of the most difficult things I would assume that a juror has to contend with.

It is not fair to these litigants for you to talk to anyone, members of your family or anyone.

When you come back here in the morning, the Marshal will be here. I want him to keep the courtroom closed except for the jurors. Let the jurors come into the courtroom. The courtroom will remain closed until court is ready to convene.

APPENDIX D

[NOTE: Appendix D consists of relevant portions of the District Court's charge to the jury in Case No. 1800, styled *Arnold G. Pessin and Rex C. Ellsworth v. Keeneland Association, University of Kentucky Research Foundation and The Bank of New York.*]

Charge of the Court

[295] Swinford, J:

The Court: Let the jury come in, Mr. Marshal.

(Reporter's Note: Jury Present.)

* * * * * * *

In the first place this case is what is known as an antitrust case, [sic.] Now, an antitrust case is a creature of statute. In essence it is a relatively simple thing and I shall attempt to reduce it for you to its simplest terms.

* * * * * * *

And so in 1890 there was enacted into the law of the United States what is known as the Sherman Act, the Sherman Antitrust Act, which says simply this, that no person or corporation or group of corporations or people can combine to prevent another person from engaging in business.

I will give you an illustration. Let us say a town of some 1,500 people had 10 grocery stores in it and another person wanted to start a grocery store in that town. If those men who were already in business got together and said, "This newcomer hasn't got too much financing or too much ability, so in order to keep him from going into business, we will buy up the available sites that he

might use, or if he goes into business we will reduce prices so that he cannot meet the competition and we will put him out of business," such an arrangement would be a violation of the Sherman Antitrust Law. In other words, that a group of individuals or corporations cannot com[296]bine and it is unlawful for them to combine and it is a penal statute. They are subject to a penalty if they do combine to either prevent the establishment of a new business or to put a business that was already established into failure.

Now, that very simply is an illustration of what this charge in this civil action is.

In 1912 Congress came along and passed the Clayton Act. The Clayton Act is a method whereby they put a penalty for creating an unlawful restraint of trade or monopoly, fix the damages that might be recovered to one who was so abused by other business enterprises.

So you have here and the thing that you are going to have to think about as I give you this charge and that you are going to have to finally determine is, did these three defendants intentionally and knowingly enter into an arrangement whereby they caused this farm, the Maine Chance Farm, to be kept from the plaintiffs to prevent them from buying it in order to continue a monopoly or a restraint of trade, the sale of thoroughbred horses.

That's your case. If these three, and I have to give you certain rules of law to guide you, you are to decide from this evidence, looking at this evidence specifically and also as a panoramic view of it, the whole evidence, the sense that you get out of this whole case, is the evidence sufficient to establish that fact within the

meaning of the rules of law these three defendants or any of them or any one of them in company with any other person or corporation, even though not named as a defendant in this lawsuit, cause this farm to be taken away by this method and kept from these plaintiffs in order to prevent them from going into a competitive horse selling arrangement opposed to Keeneland Association?

* * * * * * *

Now, this case is a damage suit. It is claimed by the plaintiffs, Dr. Pessin and Mr. Ellsworth, that they have been damaged by the acts of these three defendants. [297] So consequently they have the burden of proving what they claim. If no proof was offered in the case, then it would have to be dismissed.

So the responsibility rests primarily upon these two plaintiffs to establish a preponderance of the evidence that what they claim is true.

They thereby must sustain what is known in law as the burden of proof, and that is not only in law but in everyday language.

The burden of proving what they say has caused them to be damaged by a preponderance of the evidence and burden of proof.

You are instructed that the burden is on the plaintiff in an action such as this to prove every essential element of his claim by a preponderance of the evidence.

If the proof should fail to establish any essential element of these plaintiffs' claim by a preponderance of the evidence in the case, you should find for the defendants.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so.

In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, you may unless otherwise instructed consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

* * * * * * *

Now, as I stated to you at the outset, before you can find a verdict against these defendants or any of them you must believe that that defendant intentionally entered into this arrangement, in other words, that he did it knowingly and intentionally.

[298] So far science has not reached a point where we can open up a person's head and look into it and see what he intended. So the law has to use the next best rule and that is that a person is presumed to intend the natural consequences of his own deliberate acts, and this definition that I am going to give you is to guide you in determining whether or not intention plays a part in your application of this evidence, and reasonable inferences drawn from it to these defendants and each of them.

Intent is the purpose or aim or state of mind with which a person acts or fails to act.

Ordinarily it is reasonable to infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted.

So, in the absence of evidence in the case which leads the jury to a different or contrary conclusion, you may draw the inference and find that any person involved intended such natural and probable consequences as one standing in like circumstances, and possessing like knowledge, should reasonably have expected to result from any act knowingly done, or knowingly omitted, by such person.

An act, or a failure to act, is knowingly done, if voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Intent may be proved by indirect or circumstantial evidence.

Indeed, it can rarely be established by any other means. While witnesses may see and hear, and so be able to give direct evidence of what a person does or fails to do, of course, there can be no eye witness account of the state of mind with which the acts were done or omitted, but what a persons does, or fails to do, may indicate either intent or lack of intent to act, or to fail to act.

Unless otherwise instructed, in determining any issue involving intent, the jury may consider all the facts and circumstances in evidence in the case, which may aid determination of state of mind.

[299] Now, you will have heard the word "proximate cause," whether or not this failure to acquire this farm by the plaintiffs was the proximate result of the unlawful acts of the defendants.

In other words, it must have been the proximate cause that kept this farm from being acquired by these plaintiffs.

Now, proximate cause is defined as, an injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage; and that the injury or damage was either a direct result or a reasonably probably consequence of the act or omission.

In other words, even though they didn't get the farm, and the University of Kentucky did get it, unless you think that fact, the University of Kentucky got the farm and acquired it by this arrangement, you must believe that that was the proximate cause of the claimed injury to the plaintiffs and that injury, if any, was not from something else.

Now, I want to caution you that a conspiracy or an unlawful combine or an antitrust arrangement must usually be proved by a great number of facts and circumstances or accumulation of evidence, circumstantial evidence and not evidence of the most direct and positive kind.

Perfect proof would be if you could find three persons or four persons, or whoever the accused might be, sitting down around a table drawing up an agreement

saying, "We hereby agree to keep this person from acquiring this property."

But that, of course, I would say, you practically never are able to establish.

So you have to arrive at what they did by a number of facts and circumstances which taken as a whole and considered as a whole produce in your mind an inference that they violated the law, and that they did what the plaintiffs say that they did.

[300] So the term "circumstantial evidence" plays a big part in a conspiracy, an alleged conspiracy such as this.

Before any act which the plaintiffs are required to prove as a fact can be said to have been proved by circumstantial evidence alone, it is necessary not only that the circumstances proved by the evidence shall reasonably give rise to an inference of such facts, but also that no other equally reasonable inference to the contrary can be drawn from the same circumstances.

In other words, it must be a positive circumstance, not just an imaginary thing.

You are charged that if two equally reasonable inferences can be drawn from the circumstances proved by the evidence, one consistent with the facts sought to be proved, and the other inconsistent therewith, you may not infer the facts sought to be proved from such circumstances alone.

If two inferences can be reasonably drawn from the same facts, one pointing to wrongful conduct and the other innocent conduct, then this would mean that

if the inferences are in balance, there would not be the preponderance of the evidence the law requires before you can find a defendant liable, and it is your duty to infer that which indicates innocent conduct.

It will have to take this a little slower, because I don't want to leave out any of these definitions.

In order to find a conspiracy, you must find that a conspiracy existed between two or more persons or corporations. A corporation cannot conspire with itself or its officers or employees; and a single corporation, its officers and employees and agents may not be found guilty of a conspiracy.

In other words, you have to find it is between two separate entities. It can't just be agents or employees within one corporation.

Now, there must be knowledge. A person can't be held accountable for something that he did, even though he [301] did it, if he didn't know that he was doing it. He must have knowledge.

The proof need not show knowledge of the defendants that a particular act or failure to act is a violation of the federal antitrust laws. You don't have to go and say, "Well, I have knowledge that I am violating the antitrust laws." They have knowledge of the acts that they are committing if they do permit such acts.

Unless the evidence in the case leads the jury to a different or contrary conclusion, the presumption is that every person knows what the law forbids, and what the law requires to be done.

If the jury should find from a preponderance of the evidence in the case that the conspiracy alleged in the plaintiffs' Complaint was knowingly formed, and that the defendants, or any of them, knowingly became members of the conspiracy, then the fact that the accused may have believed, in good faith, that what was being done was not unlawful would not be a defense in this case.

In other words, he doesn't have to go into the question of whether it was lawful or unlawful, if he knew what he was doing and doing it at the time.

Mere passive knowledge of the existence of the combination or conspiracy, should you find one did exist, or of the illegal acts of others in connection therewith is not in itself sufficient to make the one securing such knowledge a member of the unlawful association.

The evidence must satisfy you, not only that he had knowledge of the existence of the conspiracy and its unlawful purpose, but that with such knowledge he knowingly participated to some extent with the members of the combination with the purpose of aiding in the common design.

Until such knowledge and connection are shown, a defendant is not bound by the declaration or statements of any other member.

Now, I gave you that instruction during the progress of the trial. It is simply that during the trial the Court has permitted the introduction of evidence concerning the ac [302] tions and statements of each of the defendants, and their officers and agents with the

specific admonition to the jury that the members of the jury must not consider that evidence against the other defendants.

Now, it is my duty to explain to you the legal requirements with respect to your consideration or disregard of such evidence.

Inasmuch as there can be no liability on the part of the defendants unless a conspiracy is proved, you must disregard all of such evidence unless you first find by other and disassociated evidence in the case that the conspiracy claimed by the plaintiff existed.

In such event you may then consider the evidence subject to the admonition in concert with all the other evidence in the case.

Specifically, however, unless you first find clear proof of a conspiracy by other and disassociated evidence, you must not consider against the defendant University of Kentucky Research Foundation any statements by witnesses Haggin, Wachs, Swinebroad, or any other alleged conspirator not made to or in the presence of some officer of the Foundation.

In other words, members of the jury, a conspiracy, as I will give you that definition a little later on, is an agreement to commit an unlawful act or an agreement between two or more persons to commit an unlawful act, commit a lawful act in an unlawful way.

The statements of any one of those conspirators may be used against all of the conspirators if you first find that a conspiracy had actually been formed and was in operation, and the statement was made during

the life of the conspiracy in furtherance of its objects and purposes.

If you believe that, then you can use that statement or statements, however many there may be against all of the conspirators. They are all bound by whatever one of them may have said. But you cannot use that statement itself as a part of the establishment of the conspiracy. You [303] must believe that the conspiracy was formed from evidence other than using the statement as a part of the evidence from which you draw the inference that there was a conspiracy or determination that there was a conspiracy.

Statements or declarations made outside of court by one person shall not be considered as evidence against any other person or defendant herein who was not present at the time and heard the statement or declaration made unless three distinct prerequisites are met:

First, that the statement or declaration was made in furtherance of the alleged conspiracy;

Second, that it was made during the pendency of the alleged conspiracy; and

Thirdly, that there is independent proof of the existence of the alleged conspiracy and that both the declarant and such other person or defendant were members thereof.

In determining whether or not such alleged conspiracy existed and whether or not such other person or defendant was a member thereof, you shall not consider any such statements or declarations made out of

the presence or hearing of such other person or defendant.

The mere declaration of one conspirator cannot alone prove that any other is a party thereto and before any such statements or declarations can be considered as evidence against either or any of the defendants other than the one making them, the facts and circumstances must be such as to satisfy you that a conspiracy had been formed and then existed, and the defendants against whom such declarations are sought to be used were parties thereto.

Now, one other thing. This is a matter which I am not sure is included in some of these other instructions that I have given you, and I want to give it to you now for fear I might overlook it.

The plaintiffs must prove that they had the preparedness and capacity to engage in the business of conducting a horse auction sales company.

[304] However, preparedness and capacity to engage in a business means more than the intention to do so and an ability to buy the necessary facilities.

In determining whether or not the plaintiffs had the preparedness and capacity to engage in the horse auction sales business, it is proper for you to consider the background and experience of the plaintiffs, any affirmative action taken on their part to engage in the proposed business, their ability to finance the business, the purchase of equipment and facilities necessary to engage in the business from which they allege that they were excluded, and the consummation or lack of

it of any enforceable contract for the acquisition of the business, necessary equipment or facility.

Now, I am going to give you these instructions as rapidly as I can. I hestitate to prolong this, but I must do it.

Andrew Jackson was a federal judge down in Nashville, Tennessee, and he had but one instruction that he gave to the jurors, and that was to go out and do right between these people. And I sometime think that it might be not a bad instruction to use all the time. But we do have to give you these rules in order that you may get a summation of law applying it to the evidence.

The plaintiffs in this case seek damages for injuries claimed to have been suffered or sustained as a result of alleged violations of the defendants of the antitrust law of the United States.

Specifically, the plaintiffs claim, first, that the defendants have combined and conspired to prevent the plaintiffs from going into the business of operating regular auction sales for thoroughbred horses in Kentucky and thus have unreasonably restrained interstate trade and commerce in the production, training, racing and sale of thoroughbred horses.

Don't let that word "interstate" cause you any trouble, because it is admitted in this case that these horses in this kind of business are moved from state to state and place to place in the country.

[305] Second, that the defendants have monopolized and conspired and attempted to monopolize interstate

trade and commerce in the thoroughbred race horse industry.

Third, that the defendant's activities and conspiracy have proximately caused damage to the plaintiffs by preventing them from engaging in the auction sale of thoroughbred race horses.

This action is brought under the provisions of the United States statute known as the Sherman Antitrust Act and the Clayton Act.

Section 1 of the Sherman Antitrust Act, dealing with restraint of trade, provides:

"Every contract, combination or conspiracy in restraint of trade or commerce is illegal."

Section 2 of the Sherman Antitrust Act declares:

"Every person who shall monopolize, or attempt to monopolize, or conspire with any other person to monopolize any part of the trade or commerce shall be guilty of a violation of the law."

Section 4 of the Clayton Act authorizes:

"Any person who shall be injured in his business or property by reason of any thing forbidden in the antitrust laws may sue therefor in an action for damages."

The word "person" includes not only every individual, but also every corporation, partnership and every other organization, of every kind and character.

The purpose of the Sherman Antitrust Act is to preserve and advance our system of free, competitive enterprise; to encourage to the fullest extent practicable free and open competition in the marketplace; and to

prevent the accomplishment of a monoply in any business or industry; all to the end that the consuming public may receive better goods and services at a lower cost.

So, any unreasonable interference, by contract, or combination, or conspiracy, with the ordinary, usual and freely-competitive pricing or distribution system of the open [306] market in interstate trade and commerce, constitutes an unreasonable restraining of interstate trade, and is a violation of the Federal Antitrust Laws.

The phrase "in restraint of interstate trade" means in restraint of trade and commerce which takes place between persons of business organizations in one state and those in another state. This is to say, trade and commerce which moves or flows or takes place, not wholly within the boundaries of a single state, but across state lines from one state into one or more other states.

To restrain interstate trade and commerce means, then, to interfere unreasonably with the ordinary, usual, and freely-competitive pricing or distribution system of the open market in interstate trade and commerce.

The amount or quantity or value of the interstate commerce involved or affected by an unreasonable restraint of trade is immaterial.

The Sherman Antitrust Act brands as unlawful any contract or combination or conspiracy, which would operate to restrain unreasonably any interstate trade and commerce, regardless of how small in amount the quantity was.

A conspiracy is a combination of two or more persons, by concerted action to accomplish some unlawful

purpose, or to accomplish some lawful purpose by unlawful means.

So, a conspiracy is a kind of partnership, in which each member becomes the agent of every other member.

The essence of a conspiracy is a combination or agreement to violate or to disregard the law.

Mere similarity of conduct among various persons, and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to [307] be, or the details thereof, or the means by which the object or purpose was to be accomplished.

What a preponderence of the evidence in the case must show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not show that all the means or methods set forth in the plaintiffs' Complaint were agreed upon to carry out the alleged conspiracy; nor that all means or methods which were agreed upon were actually used or put into operation; nor that all persons alleged to have been members of the claimed conspiracy were such.

What a preponderance of the evidence in the case must show is that the alleged conspiracy was formed, and that one or more of the means or methods described in the Complaint were agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy alleged in the plaintiffs' Complaint; and that two or more persons, including one or more of the defendants, were knowingly members of the conspiracy alleged in the Complaint.

As a general rule, whatever any person is legally capable of doing himself can be done through another as agent.

* * * * * * *

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy. I don't want to confuse you with my instruction. In other words, you don't have to know the whole plan, but if you know that such a conspiracy or arrangement or plan is in existence, then it is not necessary to know all of the details of it.

On the other hand, a person who has no knowledge of a conspiracy, but who happens to act in a way which furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

[308] Before you may find that a defendant or any other person has become a member of a conspiracy, a preponderance of the evidence in the case must show that the conspiracy was knowingly formed, and that the defendant, or other person who is claimed to have been a member, knowingly participated in the unlawful plan with the intent to advance or further some object or purpose of the conspiracy.

To act or participate knowingly means to act or participate voluntarily and intentionally, and not because of mistake, or accident, or other innocent reason.

So, if a defendant, or any other person, with understanding of the unlawful character of a plan, intentionally encourages, advises, or assists, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing participant or a conspirator.

One who knowingly joins an existing conspiracy is charged with the same responsibility as if he had been one of the originators or instigators of the conspiracy.

In determining whether or not a defendant, or any other person, was a member of a conspiracy, you are not to consider what others may have said or done. That is to say, the membership or a defendant, or any other person in a conspiracy must be established by evidence in the case as to his own conduct, what he himself knowingly said or did.

A conspiracy to exclude a competitor from any substantial market in or affecting interstate trade or commerce, such as is alleged in the Complaint, is without more an unreasonable restraint of trade.

Now, in your consideration of the evidence in the case as to the conspiracy charged, you should first determine whether or not the conspiracy existed as alleged in the Complaint.

If you conclude that the conspiracy did exist, you should next determine whether or not the defendants, or any of them, were knowingly members of the conspiracy.

[309] If it appears from a preponderance of the evidence in the case that the conspiracy alleged in the plaintiffs' Complaint was knowingly formed, and that the defendants, or one or more of them, knowingly became members of the conspiracy, either at the inception or beginning of the plan or scheme, or afterwards, then the success or failure of the conspiracy to accomplish the common object or purpose is immaterial.

The proof need not show knowledge of the defendants that a particular act or failure to act is a violation of the federal antitrust laws.

Unless the evidence in the case leads the jury to a different or contrary conclusion, the presumption is that every person knows what the law forbids, and what the law requires to be done.

If you find from a preponderance of the evidence that the conspiracy alleged in the plaintiffs' complaint was knowingly formed, and that the defendants, or any of them, knowingly became members of the conspiracy, then the fact that the accused may have believed, in good faith, that what was being done was not unlawful would not be a defense in this case. I believe I gave you that instruction before. I'm sorry.

In addition to a conspiracy to exclude plaintiffs from the thoroughbred horse auction sales business, the plaintiffs further allege that the defendants violated the federal antitrust laws by conspiring and monopolizing, and conspiring and attempting to monopolize, interstate trade and commerce in the thoroughbred horse auction sales business in Kentucky.

In this case the defendants conspired and have monopolized, within the meaning of the antitrust laws, if it appears from a preponderance of the evidence in the case, first, that they have knowingly combined or conspired either to obtain, or to maintain, the power either to remove, or to exclude or keep out, competitors from the field of competition.

[310] Second, that they possess the necessary power to remove or exclude.

Third, that they have the intent to exercise their power to remove or exclude.

Of course, if the power to remove or exclude competitors has been exercised, and if as a result of the exercise of such power one or more competitors have been removed or excluded, some actual monopolization has already occurred; but it is not necessary that competition actually be removed or excluded from the field of competition, before a combination or conspiracy can be found to have monopolized.

In other words, in this case it is not intended to put anybody out of business, but the claim here that they kept these plaintiffs from going into business, which is a violation of the law, if you believe that that is what occurred.

Monopolization by a combination or conspiracy may be found to exist, whenever it appears from a preponderance of the evidence in the case that the three essential facts or conditions just stated have in fact occurred.

The term "attempt to monopolize," as used in the federal antitrust laws, involves two essential elements.

First, an intent to monopolize and, second, some act done in furtherance of that intent, but insufficient actually to produce the intended monopoly.

In order to find an attempt to monopolize, both elements, the intent and the act, must appear, and must together result in a reasonable probability that monopolization will sooner or later occur.

Both a conspiracy to monopolize or attempt to monopolize the thoroughbred horse auction sales business and a conspiracy to exclude plaintiffs from the thoroughbred horse auction sales business are unlawful, even though the conspiracy may be formed or engaged in for what may appear to the conspirators to be laudable motives.

A conspiracy to monopolize or attempt to monopolize the thoroughbred horse auction sales business and a con-[311]spiracy to exclude plaintiffs from the thoroughbred horse auction sales business, such as are alleged in plaintiffs' Complaint, cannot therefore be justified under the federal antitrust laws, even though the conspiracy may have been formed or engaged in to prevent or halt ruinous competition or to protect the defendant Keeneland Association's share of the market.

In order to prove the essential elements of the plaintiffs' claim, the burden is upon the plaintiffs to establish, by a preponderance of the evidence in the case, the following facts:

First, that the defendants have violated the federal antitrust laws in one or more of the particulars alleged and, second, that the defendants' violations have been a proximate cause of some injury and consequent dam-

age sustained by the plaintiffs in their business or property.

All three defendants are charged with a joint enterprise to deny the plaintiffs the right to acquire Main Chance Farm, thereby, as the plaintiffs claim, denying them the right to exercise their free enterprise privilege of establishing and operating a thoroughbred auction sale with related business *or* training horses for racing, educating jockeys, and so forth.

The plaintiffs also claim that these defendants by their actions sought to create a monopoly in the interest of the defendant Keeneland Association, in conducting auction sales for thoroughbred horses.

You are instructed that even though you may believe that all three of the defendants or any two of them did not in concert with each other commit acts toward the establishment of such a monopoly, if any, yet if you believe that any one of the defendants in concert with any other person or corporation by its acts and conduct prevented the plaintiffs from purchasing the farm with the intention of monopolizing the thoroughbred horse auction business, you may find for the plaintiffs against those defendants or that defendant whom you believe is guilty [312] of such conduct as shown by a preponderance of the evidence and reasonable inferences which may be drawn from it.

If you find that the Research Foundation was acting in its own self-interest and in the interests of the University, and that the actions of the Foundation in this case were prompted solely by its desire to serve the University, free and independent of any agreement to restrain trade in interstate commerce, then you must

find that there was no conspiracy and enter a verdict for the defendant, University of Kentucky Research Foundation.

If you should find, from a preponderance of the evidence in this case, that the plaintiffs are entitled to a verdict, the law provides that the plaintiffs are to be fairly compensated for all damage, if any, to their business and property, which was proximately caused by the defendants' conduct in violation of the federal antitrust laws.

In arriving at the amount of the award, you should include any damages suffered by the plaintiffs because of lost profit. That is to say, profits which the plaintiffs would have made, but for violation by the defendants of the federal antitrust laws.

If you should find, from a preponderance of the evidence in the case, that damage to plaintiffs' business, and property, such as a loss in the profits, was proximately caused by the defendants' illegal conduct complained of, then the circumstances that the precise amount of plaintiffs' damages may be difficult to ascertain should not affect plaintiffs' recovery, particularly if the defendants' wrongdoings have caused the difficulty in determining the precise amount.

Of course, it is not possible to draw a blueprint of what might happen had these men gone on into this business. They may have made money, big money, they may have made little money. They may have made no money, or they may have lost money, but that must necessarily be taken into consideration. But that fact alone simply be- [313] cause it is difficult to prove should not deny a person who is offended in this way,

if you believe that these plaintiffs were, the right to redress, and so the law does not deny simply because it is difficult to arrive at or cannot be done with exactness or precision, them by reason of that fact the right to seek recovery.

On the other hand, the plaintiffs are not to be awarded purely speculative damages. You understand that. An allowance for lost profits may be included in the damages awarded only when there is some reasonable basis in the evidence in the case for determining that plaintiffs have in fact suffered a loss of profits, even though the amount of such loss is difficult to ascertain.

In arriving at the amount of any loss of profits sustained by plaintiffs, the jury is entitled to consider any evidence in the case bearing upon the issue.

Any award to the plaintiffs should be against only such of the defendants as you believe from the evidence violated the antitrust laws of the United States as described above, not to exceed the sum of $10 million. I think I went over that with you, but that means you may find against all of them, you may find against two of them, and you may find against one of them, if you believe that one, from the testimony, did not conspire with the other two co-defendants, but with some other person within the meaning of these rules that I have given you.

The issues to be determined by the jury in this case are these:

First, has one or more of the defendants violated the antitrust laws of the United States by combin-

ing or conspiring to exclude the plaintiffs from the thoroughbred horse auction sales business, or by conspiring to attempt to monopolize the thoroughbred horse auction sales business in Kentucky.

If your answer to this question 1 is no, as to all defendants, then you should return a verdict in favor of all of the defendants.

[314] If your answer to that question is yes, as to one or more of the defendants, then you have a second issue, was such violation of the federal antitrust laws a proximate cause of any injury or damage to the plaintiffs' business or property.

If your answer to that question is no, you should return a verdict for the defendants, but if your answer is yes, you then should return a verdict in favor of the plaintiffs against one or more of the defendants for such damage to plaintiffs' business or property as you find, from a preponderance of the evidence in the case, has been proximately caused by the conduct of the defendants in violation of the federal antitrust laws.

There has been some evidence offered in this case that there were other farms equally adaptive to the purposes to which the plaintiffs allege they proposed to put the Maine Chance Farm.

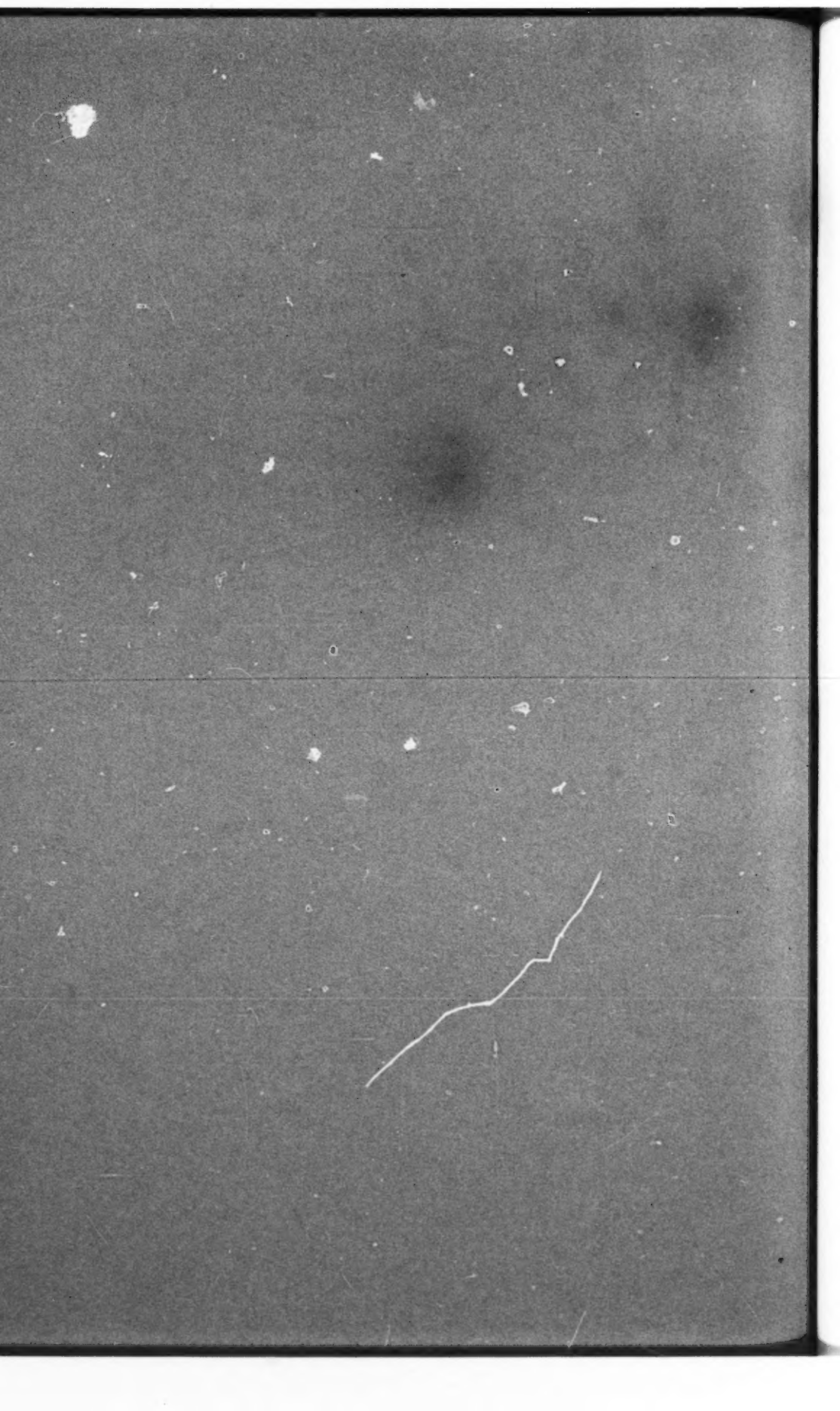
You have a right to consider that fact in determining the question of good faith on the part of the plaintiffs in their plan to establish a thoroughbred auction sale and the facilities which they allege were to accomplish it, if you believe that there were other suitable locations in this locality.

In the event you should find that the plaintiffs are entitled to recover damages, you may also consider this fact in mitigation of damages.

You are further instructed, however, that even though you may believe that the plaintiffs could have found something equal or better for their avowed enterprise, that is not a defense to their claim.

It is a violation of the antitrust law as I have defined it to you to prevent the plaintiffs from obtaining this particular farm in order to compete in the thoroughbred auction sales with the Keeneland Association.

* * * * * * *



Protective Wage Clause.

APPENDIX E

National Bituminous Coal Wage Agreement of 1950 as Amended Effective December 1, 1958

* * * * * * *

PROTECTIVE WAGE CLAUSE

[1919] The United Mine Workers of America (which, as used in this Clause, includes all of its Districts, Local Unions, Officers or Agents) and the Operators signatory hereto affirm their intention to maintain the integrity of this contract in all of its parts. The objective of this contract is to provide the maximum possible continuity and stability of employment under the conditions set forth herein. The par-[1920]ties hereto agree that bituminous coal mines shall be so operated as not to debase or lower the standards of wages, hours, safety requirements and other conditions of work, established by this contract. The parties recognizing their obligation each as to the other to exercise all possible efforts and means to attain these objectives further agree as follows:

A. During the period of this Contract, the United Mine Workers of America will not enter into, be a party to, nor will it permit any agreement or understanding covering any wages, hours or other conditions of work applicable to employees covered by this Contract on any basis other than those specified in this Contract or any applicable District Contract. The United Mine Workers of America will diligently perform and enforce without discrimination or favor the conditions of this paragraph and all other terms and conditions of this Contract and will use and exercise its continu-

ing best efforts to obtain full compliance therewith by each and all the parties signatory thereto.

B. It is recognized that when signatory operators mine, prepare, or procure or acquire under subcontract arrangements, bituminous coal mined under terms and conditions less favorable than those provided for in this contract, they deprive employees of employment opportunities, employment conditions and other benefits which these employees are entitled to have safeguarded, stabilized and protected. Accordingly, the Operators agree that all bituminous coal mined, produced, or prepared by them, or any of them, or procured or acquired by them or any of them under a subcontract arrangement, shall be or shall have been mined or produced under terms and conditions which are as favorable to the employees as those provided for in this Contract.

"Procured or acquired under a subcontract arrangement" means any contract, lease, license, agreement, arrangement or understanding pursuant to which the signatory operator acquires coal, either as principal or agent, directly or indirectly from a producer other than such signatory for delivery to a person other than such signatory.

The obligation assumed hereunder shall not affect any agreement in effect as of the date of execution of this contract: Provided, however, that any operator signatory hereto who is a party to any agreement inconsistent with the obligations assumed hereunder shall not maintain such inconsistent agreement in effect beyond the first date

at which such agreement may be terminated by him in accordance with its terms.

The Operators signatory to this agreement shall so conduct their own operations (whether operated directly or indirectly, or through subsidiaries or affiliates) so as to fully comply with their obligations under this Clause. The obligation of each Operator signatory hereto, which is several and not joint, to fully perform all the conditions in this paragraph B contained, shall be a direct and continuing obligation of said Operator during the life of this Agreement.

As a part of the consideration for this Agreement, the Operators signatory hereto agree that this Clause covers the operation of all the coal lands, coal producing or coal preparation facilities owned or held under lease by them, or any of them, or by any subsidiary or affiliate at the date of this Agreement, or acquired during its term which may hereafter (during the term of this Agreement) be put into production or use. The said Operators agree that they will not lease, license, or contract out any coal lands, coal producing or coal preparation facilities as a subterfuge for the purpose of avoiding the application of this Clause.

C. There is hereby established a Joint Industry Contract Committee composed of six (6) members, three (3) of whom shall be appointed and may be removed by the Union and three (3) of whom shall be appointed and may be removed by the Operators. Such appointments shall be made and notice thereof given to the proper parties hereto as expeditiously as possible and not later than

thirty (30) days after the date of the execution of this Contract. In the event of resignation, removal, death, inability or unwillingness to serve of any of the members of the Committee, the Union shall appoint the successor or successors of the members originally appointed by it and the Operators shall appoint the successor or successors of the members originally appointed by them. Action which may be required of the Operators for the appointment of any member of the Joint Industry Contract Committee representing them may be taken by those Operators who, at the time, are signatories hereto. Authorization, approval or ratification of Operators representing fifty-one (51) per cent or more of the coal produced for use or sale during the calendar year previous to that in which such action is taken shall be sufficient to bind all Operators.

The Joint Industry Contract Committee may appoint such Joint District Contract Committees in such districts or groups of districts as it may determine, such district committees to consist of such numbers of members, half of whom shall represent the Union and half of whom shall represent the Operators in that district or groups of districts, as the Industry Committee shall deem advisable. The Joint District Contract Committees shall assist the Joint Industry Contract Committee in making any investigations hereunder.

The Joint Industry Contract Committee and the Joint District Committees, when authorized by and under the supervision of the Industry Committee, may employ such clerical and other em-

ployees as are required for the performance of their duties hereunder. Expenses of all Committees shall be borne equally by the Union and the Operators.

D. Within one hundred and twenty days after the execution of this contract and each six months thereafter each Operator signatory hereto shall certify in writing to the Joint District Contract Committee for the District where he maintains his principal place of business where such a District Committee exists, or to the Joint Industry Contract Committee where no District Com[1921]mittee exists, that he is in full compliance with all the terms and conditions of this contract or any applicable District Agreement. Within one hundred and twenty days after the execution of this Agreement, and each six months thereafter each Union District President shall certify in writing to his Joint District Contract Committee, if one exists, or, if none exists, to the Joint Industry Contract Committee, a complete list of all Operators and Mines engaged in the production of bituminous coal within his district whose operations are under contract with the Union. No operator may be found to be in violation of this Protetctive Wage Clause with respect to any coal produced by another operator who is listed on the Contract list to be furnished by United Mine Workers of America under this paragraph, unless and until such operator is notified in writing by the Joint Industry Contract Committee that such operator has failed to comply with the provisions of this Clause and such failure has not been corrected.

Protective Wage Clause.

E. Any party signatory to this contract shall have the right at any time to file a complaint with the Joint Industry Contract Committee alleging a violation of any provision of this Protective Wage Clause. In the event such a charge is filed it shall be the duty of the Joint Industry Contract Committee to investigate and determine the facts with respect to such alleged violation. Any determination by the Joint Industry Committee that a violation of this Clause has occurred may be made only upon the concurrence therein of a majority of the membership of the Committee. Notice by the Committee to the affected party, opportunity for the party to be heard, and failure promptly to effect full compliance after a finding of violation by the Committee shall be deemed a condition precedent to any final determination that a violation of this Clause has occurred. Findings made by the Joint Committee, after notice and opportunity for hearing, shall be served upon all parties to the proceeding, and shall constitute a final determination as to the fact of a violation. Failure or refusal of United Mine Workers or any Operator signatory hereto to comply with a final determination by the Committee of a violation of Paragraphs (A) or (B) of this Clause may be deemed a violation of this Agreement.

The Mine Workers agree to make available to the Joint Industry Contract Committee all contracts, agreements, or understandings entered into by the Mine Workers with any person engaged in the production of bituminous coal, and further agree to appear before the Committee on request by it

and inform the Committee on such other related and pertinent matters as shall be essential to the Committee's investigation of an alleged violation of this Protective Wage Clause. Each Operator signatory hereto agrees to appear before the Committee on request by it and inform the Committee as to the source and quantity of coal produced or purchased or otherwise acquired, payment of wages to, and hours and working conditions of classified employees, payments to the United Mine Workers of America Welfare and Retirement Fund, and such other related and pertinent matters as shall be essential to the Committee's investigation of an alleged violation of this Protective Wage Clause.

The authority of the Committee is restricted to subject matter covered in this Protective Wage Clause and shall not extend to disputes concerning the administration of the Contract which are of the type that have heretofore been processed under the grievance procedures provided for in the Section of the Contract entitled "Settlement of Local and District Disputes"; nor shall the provisions of this "Protective Wage Clause" be subject to the terms or conditions of the "Settlement of Local and District Disputes" section of this Contract.

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NOS. 1479 and 1483

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

NO. 1479

CONSOLIDATION COAL COMPANY - - *Petitioner*,

v.

SOUTH-EAST COAL COMPANY - - - *Respondent*.

NO. 1483

UNITED MINE WORKERS OF AMERICA
- - - - - - - - - - - - - - - - *Petitioner*,

v.

SOUTH-EAST COAL COMPANY - - - *Respondent*.

On Petitions for Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1970

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v.

SOUTH-EAST COAL COMPANY,
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On Petitions for Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The Petitions correctly state that the opinion of the Sixth Circuit in these two (2) cases is reported in 434 F.2d 767.

JURISDICTIONAL GROUNDS

The Petitions correctly show that this is a Sherman Act case based on 15 U.S.C. Sections 1, 2 and 15, and this Court has jurisdiction under 28 U.S.C. Section 1254(1).

COUNTERSTATEMENT OF THE CASE

A. THE NATURE OF THE ACTION.

Respondent, South-East Coal Company (South-East), a producer and seller of bituminous coal in Eastern Kentucky, brought this case in the United States District Court for the Eastern District of Kentucky, Lexington, against petitioners, United Mine Workers of America (UMW), an international labor union, and Consolidation Coal Company (Consol), the largest producer and seller of bituminous coal in the country, operating in a number of states, its principal office being in Pittsburgh, Pennsylvania. The suit is based on the Sherman and Clayton Acts (15 U.S.C. §§1, 2 and 15).

Briefly, South-East charged that petitioners and the Bituminous Coal Operators Association (BCOA), which was organized by Consol in 1950, and others engaged in an unlawful conspiracy in the period of this case (1962-1966) to eliminate and suppress competition and production of all but the largest companies in the coal industry. The plan of the conspiracy was that only the coal operators who signed and complied with the National Bituminous Coal Wage Agreement of 1950 as amended (NBCWA), including the 1958 Supplement containing the Protective Wage Clause (PWC), and the later supplements which contained the 80¢ Welfare Clause, would be permitted to carry on operations. It was alleged that the smaller companies or companies not operating in ideal working conditions could not operate profitably under the provisions of the National Agreement;

that those who did not sign were not permitted to operate, and were forced out of business; and that plaintiff was damaged as a result of the conspiracy. It was further charged that, pursuant to said conspiracy, Consol boycotted South-East coal and deprived South-East of its customary markets, and UMW induced two long and damaging work stoppages at South-East's mine and cleaning plant.

B. THE TRIAL COURT CHARGED THE JURY THAT DEFENDANTS WERE NOT LIABLE UNLESS IT WAS FOUND THAT DEFENDANTS WERE ENGAGED IN AN INTENTIONALLY PREDATORY CONSPIRACY UNDER WHICH THE NATIONAL CONTRACTING ARRANGEMENT WAS BEING USED FOR THE PURPOSE OF DRIVING THE SMALLER COMPETITORS OUT OF THE INDUSTRY.

The Trial Court in this case repeatedly and clearly charged the jury that the only basis upon which they could return a verdict for the plaintiff and against the defendants was upon a finding that the national contracting arrangement of the defendants was being used for the purpose of driving the smaller competitors out of the industry pursuant to an intentionally predatory conspiracy between them (1838, 1842-3, 1844, 1845-7).* The jury found for the plaintiff under this charge.

C. THE THEORY OF LIABILITY AND THE COURT'S INSTRUCTIONS WERE FOUNDED ON *UNITED MINE WORKERS v. PENNINGTON*, (1965), 381 U.S. 657.

The theory in this case of predatory conspiracy between a union and business groups to drive competitors out of

* Page references, unless otherwise stated, are to the Joint Appendix in the Court of Appeals which has been certified to the Supreme Court.

markets and out of business was founded on *United Mine Workers v. Pennington*, 381 U.S. 657, which, in turn, was based upon *Allen Bradley Company v. Local Union*, 325 U.S. 797. Congress has allowed the *Allen Bradley* decision to stand for 25 years as a much relied upon precedent. This case was tried before the decision of this Court in *Ramsey v. United Mine Workers*, No. 88, October Term 1970.

D. THE FOUR JURIES WHO HAVE CONSIDERED THE ALLEGED PREDATORY CONSPIRACY IN THE COAL INDUSTRY HAVE ALL FOUND THAT THE CONSPIRACY DOES EXIST.

In the four cases in which juries were asked to determine whether the alleged predatory conspiracy actually existed in the coal industry, *all* of the juries have responded in the affirmative. Besides the verdict in this case, there were affirmative verdicts in the "*First Pennington Case*", *Pennington v. United Mine Workers*, 325 F.2d 804, reversed and remanded 381 U.S. 657; *Tennessee Consolidated Coal Company v. United Mine Workers*, 416 F.2d 1192; cert. den., 397 U.S. 964; and in *Blue Diamond Coal Company v. United Mine Workers*, Civil Docket No. 6189, United States District Court for the Eastern District of Tennessee, Northern Division (no appeal).

E. THE TRIAL COURT DID NOT SUBMIT TO THE JURY ANY THEORY OF LIABILITY BASED UPON THE ILLEGALITY OF AN AGREEMENT WITHOUT SPECIFIC PREDATORY INTENT BY THE UNION WITH ONE BARGAINING UNIT TO IMPOSE CERTAIN WAGE TERMS IN OTHER BARGAINING UNITS, WHICH WAS PART OF THE THEORY IN *RAMSEY v. UNITED MINE WORKERS*, NO. 88, OCTOBER

TERM, 1970. THE JURY HERE HAD TO FIND PREDATORY CONSPIRACY BEHIND THE NATIONAL CONTRACTING ARRANGEMENT UNDER THE COURT'S CHARGE.

On December 7, 1970, this Court heard argument in *Ramsey v. United Mine Workers*, No. 88, October Term, 1970, (decided February 24, 1971) on certiorari to the Sixth Circuit, 416 F.2d 655, a case tried by the District Court without a jury. The theory in that case went beyond simply predatory conspiracy to drive competition out of the industry and also included the contention that there was proved an agreement by the union with one bargaining unit to impose certain wage terms in other bargaining units, and that this agreement was illegal, even without specifically proving predatory intent. This additional *Ramsey* theory was not charged to the jury in this case. Rather, the Trial Court confined his charge to the alleged intentionally predatory conspiracy relying on *Pennington* and *Allen Bradley*.

F. THE TRIAL COURT GAVE BOTH DEFENDANTS THE BENEFIT OF A GENEROUS INSTRUCTION UNDER THE "CLEAR PROOF" RULE UNDER SECTION 6 OF THE NORRIS-LaGUARDIA ACT. THE CHARGE WAS MUCH MORE GENEROUS TO BOTH DEFENDANTS THAN WOULD BE JUSTIFIED UNDER THE CONSTRUCTION PLACED ON SECTION 6 BY UMW IN ITS FINAL BRIEF AND ARGUMENT IN THIS COURT IN *RAMSEY* OR BY THE DECISION OF THIS COURT IN *RAMSEY*.

The courts have been confronted with the meaning and scope of the "clear proof" rule under Section 6 of the Norris-LaGuardia Act in this series of coal cases, including "*Second Pennington*", *Lewis v. Pennington*, 400 F.2d

806, cert. den. 393 U.S. 983; *Tennessee Consolidated Coal Company v. United Mine Workers, supra*; and *Ramsey v. United Mine Workers, supra*. UMW in those cases had argued that "clear proof" must go to final conclusions on every phase of antitrust cases against labor unions such as this. In cases before *Ramsey* the UMW's argument was not aimed primarily at specific language in Section 6, but apparently was more related to the exemption provided unions under antitrust statutes when they act alone, and UMW was the only defendant in previous cases. The UMW urged that when a union was involved as a defendant in an antitrust case a new standard of proof should be fashioned for determining issues of liability. But this court rejected that contention in *Ramsey* saying: "Nor do we discern any basis for ourselves fashioning a new standard of proof applicable in antitrust actions against labor unions." The opinion of the Sixth Circuit in this case points up the soundness of this Court's conclusion in *Ramsey* even in face of any of the previous arguments which go beyond the language of Section 6 of Norris-La-Guardia.

In this case the Trial Court extended to both defendants the most generous charge that could reasonably be argued for under Section 6 or under either the majority or dissenting opinions in *Ramsey*. Section 6 pertains to responsibility for unlawful acts in labor disputes. The unlawful activity charged in this case was predatory conspiracy violating the Sherman Act.

The Court in this case charged " ... such an anti-competitive conspiracy as claimed by the plaintiff must be established by clear proof." (1836).

Then the Court finished off his charge leaving the version of clear proof that both defendants wanted strong and fresh in the minds of the jury:

> "Members of the jury, the Court has already charged you that the issue of alleged conspiracy in this case must be decided upon clear proof, that is, the plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal, and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof." (1915).

The foregoing charge certainly extends beyond, and is more generous to both defendants than, what any instruction under Section 6 would be under the construction placed on that section by UMW in its final brief and argument in this Court in *Ramsey*, *supra*. In the latter case UMW had argued that all elements of the conspiracy must be proved by clear proof (as it had successfully argued in *Second Pennington*, *supra*) but after this Court granted certiorari in *Ramsey*, and realizing the error of its previous successful arguments along this line, UMW switched to the contention that Section 6 really was limited to proving authorization, ratification or participation in acts of agents, but that the Trial Court in *Ramsey* had actually so limited the rule.

The charge of the Trial Court in this case certainly goes considerably beyond the last UMW contentions in *Ramsey* and, we submit, satisfies any reasonable construction of the statute. The rule should not be resorted to simply as a snare or escape hatch to confuse courts and be construed in different ways to frustrate the attainment of a just result in such a case as this.

G. COUNTERSTATEMENT OF FACTS

1. The Petitions Have Challenged the Sufficiency of the Evidence and the General Fairness of the Jury Charge. Respondent Must Detail the Facts Sufficiently to Show These Challenges are not Valid.

Consol's petition, at pages 24 and 25, contends the District Court erroneously overruled Consol's post-trial motions based on insufficiency of the evidence and that the District Court's jury charge was generally inadequate and prejudicial.

Such questions as these cannot be adequately answered without giving enough detail in a statement of facts to show the Court the nature of the record upon which such questions are raised. Also the arguments under several of the other questions posed in the petitions are generally aimed at a kind of case that is not reflected in this record.

2. This Brief Contains Only an Abbreviated Outline of the Proof Previously Considered by the Court Including That Which Was Also in *Ramsey v. UMW*. This Brief Concentrates On New Facts in This Case About the Conspiracy and Its Effect on South-East.

This Court has recently considered *Ramsey v. United Mine Workers*, *supra*, which contained a substantial part of the evidence on developments in the coal industry which is also in this record. It would be unduly burdensome to detail that proof in a brief in opposition to petitions.

At the same time, in order to remind the Court of such proof, an abbreviated outline of the same is included in this brief below under heading number 4.

This Brief itself will concentrate on new facts in this record about the conspiracy and its effects on respondent and Eastern Kentucky. South-East was an older and more substantial coal producer than the plaintiffs in previous cases dealing with the alleged conspiracy. Also the president of South-East, Harry LaViers, Sr., had a personal acquaintanceship before the late 1950's with the principal officers of UMW, of Consol, and also with the other leaders in the industry. Before the 1950's, LaViers was one of UMW's good friends according to UMW (638-9, 1426). Also, before 1962 Consol was South-East's biggest customer (401-2). LaViers, before the 1960's, took an active part in various groups of industry leaders (479, 667). As far back as 1940 he was on the boards that administered NRA coal codes and the Guffey Act investigations (476). For these reasons the record in this case contains more evidence of the alleged predatory conspiracy in coal than previous cases.

3. Summary of the Basic Factual Contentions of the Petitioners. Since There Was Evidence From Their Own Records or Witnesses That Strongly Refuted Every Contention Made by Petitioners, It Cannot Be Said That the Jury's Verdict Was Unreasonable.

Petitioners contended that they did not combine, conspire or agree as charged. The prime effort of petitioners at the trial was to make subsidiary factual contentions to counteract the obvious fact that petitioners anticipated and knew, that their long sustained and willful course of conduct would wreck and was wrecking, the businesses not only of South-East but also all the other competitors similarly situated throughout the industry, and also to counteract the proof in this record from minutes of as-

sociations and committees that the UMW's national contracting course of conduct was insisted on by the associations of companies whose purpose was to raise coal prices by attacking competing production through the union (794-836, 881, 1654-64).

UMW contended (1) it adopted its uniform national contracting practice pursuant to policies adopted early in its history favoring uniform wages, and that it made no change in policies in 1950 on the formation of BCOA as claimed by respondent (a contention inconsistent with UMW's own official records as shown in heading number 4 below). UMW further contended (2) respondent never sought any contract from UMW except the "standard" or national contract and merely procrastinated in signing a renewal of that contract until the local unions struck, and (3) that UMW's district officers stood ready and willing to "negotiate item by item" with respondent.

The petitioner, Consol, contended (1) it was no more responsible for the establishment and activities of BCOA and the resulting national contracts than other signature companies; (2) that while it stopped purchasing respondent's coal when respondent cancelled the UMW contract, Consol was not boycotting respondent's coal; that Consol never did pay any attention to the language of the Protective Wage Clause (PWC) of the national contract that called for a boycott of respondent's coal when respondent cancelled and stopped complying with that contract. Also Consol contended (3) it stopped buying respondent's coal because it did not need it since the market for this type coal was on the decline.

Both petitioners contended (1) respondent was equally guilty as the petitioners (pari delicto) since it was a member of Southern Coal Producers Association (SCPA) which

agreed to the national contracts on behalf of its members. And both petitioners contended (2) respondent's troubles stemmed altogether from poor judgment and lack of good management.

There were other lesser contentions made by petitioners but most of their proof was devoted to the foregoing propositions.

With respect to UMW's contention that plaintiff never sought any contract except the UMW "standard" or national contract, this is the testimony of five UMW district and local representatives. But their testimony is directly contrary not only to the testimony of plaintiff, but to the written pleas of plaintiff to UMW's principal officers begging for a more practical and workable contract. Receipt of these written pleas was acknowledged and they are in the record, but it is conceded that there were no responses from UMW (440-1, 452-3, 624-6). "Negotiations" extended over a period of four years and two long, devastating strikes. The UMW international officers did not testify and a substantial part of the "bargaining" efforts of plaintiff was with them (443-5, 461-3, 901-5).

The district and local officers also testified that they stood ready, willing and able to "negotiate item by item" with plaintiff and they made a point of impressing this on the plaintiff and the plaintiff's employees. But they also acknowledge that plaintiff completely revealed its financial records to UMW representatives but these representatives say they never heard or saw anything that "they could recommend to the scale committee that they should accept" (1417). It is also true that UMW answered interrogatories in this case on May 22, 1967, disclosing that no one in UMW could approve contract terms except its international scale committee, on which sat its international

officers, and these authorities have not approved a single change in a single contract with a single producer at variance with the national contract as amended since 1950 (754, 777).

As to Consol's contention that it has no more responsibility for the establishment and later activities and contracts of BCOA than other signature companies, Consol's chief officer, Mr. George Love testified as a "live" witness at the jury trial in this case, "you certainly didn't want your competitors to pay less wages, if you could do anything about it, than you did" (1486), and one thing wrong with the coal industry was there were too many companies (1485). Love was one man in the industry who "could do anything about it."

He talked about forming BCOA in 1949 with Harry Moses (851), and it is stipulated by Consol that BCOA's articles of association empowered George Love to call the first meeting in 1950; that he called that meeting, became the first chairman and then headed the committee that obtained Harry Moses as president, the officers and directors of Consol and of Moses' company (Frick Coke Company of U. S. Steel) having over 50 percent of the voting power in BCOA by reason of representation of participating annual production (860-870). Love or his Consol successor served on the special three-man committees that assisted Moses in negotiating with UMW after that (1341, 1376, 1491-2).

There is one area of sharp conflict in testimony concerning the alleged boycott of plaintiff's coal by Consol. The latter had purchased very substantial quantities of plaintiff's coal for a number of years, but after September, 1959 and before 1962, Consol not only bought the coal but insisted upon being sales agent for all the plaintiff's coal

(401-4). When plaintiff had three years of operating losses it advised Consol in late 1961 that it was going to have to cancel the UMW contract. The plaintiff's testimony is that the Consol representative advised that if this happened Consol could not continue to handle plaintiff's coal (425-6, 431-2, 894). The Consol witness denies this (1567).

But there was the PWC in the national contract at that time—plainly calling for a boycott by Consol if plaintiff did not pay national contract terms (431, 1920). Plaintiff's officers believed the word that Consol would no longer handle the coal, and they believed the contract meant what it said. So they proceeded to start setting up a new sales company, advised Consol of this, gave the required sixty days notice of cancellation of the UMW contract, and cancelled the Consol agency when the new sales company organization was complete (432-5, 680-2).

Virtually no more of plaintiff's coal was purchased by Consol, for the first time in many years dating back to long before the Consol-plaintiff agency relationship had been established (401-3, 437-40).

Now, Consol says it was not applying a boycott even though the then existing national contract called for a boycott and even though it was a heavy stockholder and creditor of plaintiff, and plaintiff tried hard to sell coal to Consol (437-40, 683-6).

Consol says it never did inquire into the wages or union connections of its suppliers and that from the very beginning, when PWC was put in the contract in 1958, Consol never paid any attention to that clause and made no policy change as to dealing in the coal produced by others. Consol witnesses testified that when the PWC was put in the contract the instruction issued in the Consol organization was to make no policy change. Their explanation

was that the Landrum-Griffen "Hot Cargo" provision raised a question of illegality as to the clause (858-9, 1451, 1460, 1473, 1558).

But Landrum-Griffen came almost a year after the PWC was put in the contract and it came after the Joint Industry Contract Committee (JICC) (the policing body under PWC) had made formal findings of violation on the part of over 1300 coal companies for not certifying compliance with PWC, this information being contained in minutes of JICC which South-East was able to locate and put in evidence (794-835).

While Consol was the largest company and had such a part in setting up the machinery that made the contract, the jury obviously could not swallow the Consol contention of never having paid any attention to the language when that language was being strictly applied against over 1300 lesser companies (816-825). The Consol testimony on this point simply was not believed, with full justification, when Consol did refuse to buy any more South-East coal exactly as required by the PWC.

Another explanation Consol furnished for stopping the buying of plaintiff's coal was that the market for this type coal had declined and the small quantities required were readily available from other companies for whom Consol continued to act as agent. Two Consol purchasing officers previously associated with purchases from plaintiff, Messrs. Burke and Durkin, supported this theory (1444, 1470-1). But a later Consol witness, the man most closely associated with the situation, Mr. Thompson, had an entirely different, more detailed and far more believable story on cross-examination. He was a Consol witness and his version on being cross-examined was that Consol's Cleveland office let it be known that there would be no

plaintiff's coal and this came in late 1961 (a time when plaintiff had revealed its intent to go non-union but sometime before it cancelled the Consol agency). Thompson testified that this was a shock to the Consol purchasing organization which needed very substantial quantities of that type coal. After a considerable period of efforts by this witness, with conferences between various Consol offices, and testing of coal and adjustments made at the preparation plant of another company, a replacement was finally made for plaintiff's coal (1642, 1646, 1648-50). So the final Consol excuse that Consol had no need for plaintiff's coal missed its mark with the jury for obvious reasons.

As to the defense of pari delicto, there is little left of this defense in an antitrust suit after the decision of this Court in *Perma-Life Mufflers, Inc. v. International Parts, Inc.*, 392 U.S. 134. Also to show there is no factual basis for that defense we refer to the part of this brief below under heading number 5.

As to the defense that plaintiff was guilty of poor judgment and lack of good management, the "poor judgment" charge stemmed from the agonized decision of plaintiff's officers and stockholders not to abandon operations in Eastern Kentucky as Consol had done when the best mining conditions were exhausted (1537-8); not to liquidate and retire to easy living on the company's fat accumulated surplus when old properties approached exhaustion; but rather to find the best coal property remaining in Eastern Kentucky and stick in the coal business there. Defendants' own counsel on cross-examination, brought out that one aspect of this decision was to help alleviate the extreme economic difficulties and severe unemployment rampant in Eastern Kentucky coal fields (380, 531, 886-7, and see Plaintiff's Exh. 8, 1942).

As to the defense of poor management, defendants' witness, one of the best qualified to know, testified that plaintiff was the most highly efficient and productive producer left in Eastern Kentucky (1403). Plaintiff had done everything possible to get production costs to the bare minimum in its condition (354, 891-2).

The issue of predatory or anticompetitive conspiracy was presented to the jury in the clearest and most understandable words possible by the Trial Court in its charge. The jury found against defendants. Looking at the record as a whole (without "compartmentalizing the various factual components and wiping the slate clean after scrutiny of each" — *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 699), it is difficult to see how any jury could come up with a different answer.

4. Brief Summary of the Proof of Agreements and Understandings in the Coal Industry that Was in *Ramsey v. UMW* as Well as in This Record.

To be brief we shall only outline the areas of the proof previously considered by this Court in *Ramsey*.

Contrary to the contentions of petitioners, UMW did not have a consistent wage uniformity policy before the organization of BCOA in 1950. Differentials gave recognition to all segments of the industry in collective bargaining. Uniformity in wages made no substantial gains until the heavy demands for coal of the World War II period. The decline in the coal demand in the post-war period left the alternatives open to UMW (1) to retain a system of substantial differentials in wages, (2) to push through a plan of production control to assure employment for a maximum number of members, as it actually set out to do in 1948 and 1949 in the Bituminous industry and actually did in the

Anthracite industry, or (3) surrendering to the demands of Consol and the major companies to allow no difference in wages throughout the industry with the obvious and necessary effect of wiping out competition and jobs for members (630-1, 852, 1007-11, 1022-6, 1111-3, 1165-76, 1360-1, 1389-92, 1486).

This record shows clearly that the third alternative above was deliberately chosen. It shows why the wage differentials system in coal before the 1940's was fair and promoted maximum jobs and competition and also why the system devised by UMW and BCOA of flat wage increases across the board for every job in the industry after 1950 was unfair and drastically restrained employment and competition. It is established in the record that once a business unit or group seizes control of industry-wide wage policy in an industry like coal, it can regulate all the economics of the industry (357-360, 364-5, 885, 889-890).

In the bargaining conferences before 1950 in which UMW had negotiated terms with the northern conference, the Southern Coal Producers Association and the "captive" mines, there were open meetings with board representation and every segment of the industry found a voice.

The Bituminous Coal Operators Association was formed on July 22, 1950, resulting from discussions between Mr. Harry Moses (of U. S. Steel) and Mr. Love (of Consol) that had commenced in 1949 (761, 850-1).

It was Mr. Love of Consol, who wanted competitors to pay wages no lower than his if he "could do anything about it" (852, 1022-3, 1486). Representing the largest company and being the spokesman for the northern industry in labor matters, he was in a position to do something about it and he proceeded to do it.

Love and his collegues decided they would try to get the negotiations out of the public view and into private sessions. This was a decision of the industry leaders, not the union (1333, 1345-7, 1479-81). According to Mr. Love, this accomplished the big change that did occur in 1950, since after BCOA was established the contracts could be negotiated "quietly" in Washington where the negotiators had their officers (1481).

In fact, to show UMW was not connected with this change UMW's chief counsel, whose testimony was read, stated that there was discussion in the press from industry leaders "that a tsar (sic) in the industry was going to be in the bituminous industry, was going to be selected by the operators and there was all sorts of speculation in reference to it in June of '49 and the union publicly disclaimed connection with this movement" (1270). However, it is true that Lewis had said shortly before: "If the operators of this country can't give any leadership on the commercial side of this industry, the United Mine Workers of America can and will" (1360-1). And it is true that when BCOA was established UMW did readily enter into "quiet" and private negotiations with BCOA for contracts that did, in fact, cover the entire industry. Also it is true that the chief officers of both BCOA and UMW have welcomed and praised the opportunity to sit down in private session to decide the problems of the whole industry "authoritatively" (776, 1347).

Under BCOA a new bargaining technique was developed. Throughout the 1950's two-man bargaining teams in "quiet" or "mystery" bargaining worked out a series of very substantial, flat, across-the-board wage increases in amendments to the National Bituminous Coal Wage Agreement of 1950, applicable in identical amount for every job in the industry. Consol officers were always on the three-man

committee that prompted the BCOA representative in making these amendments to the National Contract. UMW has not allowed a single change in a single contract with a single coal producer from the printed forms that were worked out in these sessions (763-771, 775, 777, 1275-7, 1481).

Even the third largest coal association (Illinois Coal Operators Association) containing the second largest coal company of the country could not escape from the dictatorship of the BCOA Contracts (1659).

The record shows the dramatic shift in the policy and attitude of UMW after the formation of BCOA. Instead of pursuing its historic policies favoring equal work opportunities for all members and competitive equality, after 1950 UMW considered the smaller units as "just a drag on the industry" and "more of the obsolete units will fall by the board and go out of production" (784-5). UMW acknowledged the contracts were forcing intensive mechanization (788) and UMW favored the taking over of the industry by the combines being formed in the industry (1106).

Under this authoritative UMW-BCOA dictatorship which concededly was forcing intensive mechanization on the industry, the average number of men employed in the industry daily has fallen rapidly. In 1950 there were approximately 416,000 men employed and in 1959 there were approximately 180,000 men. By 1966 the figure was 131,752. This is attributed to mechanization and increased productivity required by the flat wage increases across the board. In 1920 the underground production averaged 3.97 tons per man per day. In 1949 it was still only 5.42 tons. But by 1963 it was 12.78 tons. This does not include surface mining which shows much higher figures. Plaintiff

engaged only in underground production (351-2, 355) (Plaintiff's Exhs. 6 and 7, 1940-1).

Much has been written of the tragedy and despair in the regions (mostly in the Appalachians) tied to the coal industry where the attainment of the highest degree of mechanization was more difficult or impossible.

At the very time when these harsh economic consequences of their actions were taking place, the petitioners were busily engaged in tightening up the screws of their dictatorship so as to remove from these people any ray of hope at all for work or self-support. This brings us to the period of 1958-1959 when BCOA formed a consortium with the next two largest coal associations (the Illinois Coal Operators Association and the Southern Coal Producers Association (SCPA)) and inserted the Protective Wage Clause (PWC) into the December, 1958, amendment to the national contract. The terms of the PWC are in the record at pages 1919-1921.

5. This Record Goes Beyond the *Ramsey* Record. It Establishes That Consol Controlled BCOA, That the Purposes of the Contracting Policy of UMW, BCOA and Other Major Associations Was to Drive Out Competition to Raise Prices, That the Effects Have Been Extreme in Eastern Kentucky, and Harry LaViers of South-East Tried Long and Hard to Change the National Contracting Pattern to Alleviate Distress in the Southern Fields. The Major Companies Would Not Listen.

The Articles of Association of BCOA gave Mr. Love the power to call the first meeting of BCOA. He called that meeting in 1950 and became its first chairman. Under BCOA voting rules the officers and directors of

Consol and of Mr. Moses' company (H. C. Frick Coke Company, division of U. S. Steel) could control any vote (860-6). Love and his Consol successors served on the three-man committee of BCOA that controlled the bargaining (1341, 1376, 1491-2).

As stated above, the effects of BCOA's contracts have been severe in drastic unemployment and economic deterioration in many areas. Of particular concern in this case are the statistics and findings of the United States Department of Labor in 1959 as to the five-county area of Eastern Kentucky wherein this plaintiff, South-East, operated. This has been the hardest hit area in the country and blight and suffering has been indescribable and apparently unescapable (356-360).

The efforts of UMW members in these areas, driven out of jobs as have about two-thirds of the union membership, to find and hold onto work in non-contract coal operations brought on the PWC in 1958 and 1959. The part that the major associations had in getting PWC into the national contract is important in this case.

Of particular interest in SCPA since its territory encompassed Eastern Kentucky and plaintiff was a member of SCPA before 1962. The defendants in this case went to great lengths to tie South-East to responsibility for SCPA actions and to show that Mr. Moody, head of SCPA, was the principal instigator and prime mover (along with Mr. Fox of BCOA) in getting the PWC into the national contract (790-1, 794, 1278-9, 1654-6).

The reasons and purposes for the PWC being put in the contract, according to the report of Mr. Moody to his SCPA Board of Directors in the regular minutes of that Board for the meeting of December 3, 1958, were as follows:

"In the promulgation of this contract over the years, and especially in the past ten years, we have established a wage situation whereby most operators and industry as a whole had to go to general mechanization of their operations because of the very high cost of labor. In so doing, in the case of the coal industry, there was a major decrease in the number of employees and according to the Bureau of Labor Statistics there was a drop from 400,000 to less than 200,000.

"There has been a major increase in the number of pensioners. Many miners left the coal fields, but many have returned and many never left and so we find a surplus of labor throughout the coal fields. The law of supply and demand took over and we discovered that the labor price established by the contract was not the price established by the number of miners available for work. This situation encouraged the establishment of mines, not under the union contract. This also presented the union with a problem, as they found men who were members of the United Mine Workers effectively opposing interference with their non-contract operations in order to hold their jobs. Therefore, the union found it was unable to carry out major organizing campaigns. Lastly, the coal market was rather seriously weakened as far as price was concerned, as there was a premium of non-contract, low-priced coal." (1661-4, 1944-5)

Defendants claim plaintiff is equally guilty with them of any antitrust wrongdoing because of its membership in SCPA and the service of Harry LaViers, Sr., on the SCPA Board of Directors. Mr. LaViers, Sr., was president of plaintiff and was a charter member of SCPA in 1941.

SCPA was the second largest association of coal producers. BCOA, and the predecessor group of operators

that made up the Northern Conference that had formerly met with UMW, made up roughly one-half of coal tonnage (761—one line missing, see transcript 1009; 1225). SCPA made up about one-fourth of the tonnage (671, 1009).

SCPA was organized October 17, 1941, after the dispute that year over the elimination of the north-south Appalachian differential (1260). The northern group got the union to put a "most favored nation" clause into its new contract that year, which meant that UMW would be bound to eliminate in the southern contracts the general 40 cents per day wage differential that southern appalachian companies previously had below northern appalachian companies (476-8, 627-31, 1219-1220).

The purpose of SCPA was to join together to combat the application in the southern Appalachian companies of the contracts negotiated by UMW with the northern group (660). But it developed after BCOA that SCPA could get no meaningful audience with UMW, and the UMW-BCOA national contracts were made to apply in the south as elsewhere. SCPA had no effective part in their negotiation. The south had the alternatives of signing or taking a sixty-day notice of contract termination and strike (481, 486-7, 579-80, 657-9).

Mr. LaViers was a charter member of SCPA and explained SCPA on cross-examination as follows:

> "The Southern Coal Producers Association was organized in 1941, when the northern and the United Mine Workers imposed or tried to eliminate—did eliminate the 40-cents differential.
>
> "Since then, it has participated in some national wage negotiations, and after 1950, when the national coal wage agreement was agreed upon by the BCOA

and the United Mine Workers, the Southern Coal Producers Association has had practically nothing to do with any negotiation subsequent to that time.

"It has attempted to have improvements made in the contract, it has tried to add differentials established that would recognize the economic conditions in the various producing areas.

"It has tried to effect other changes in the contract, to clarify it, and to make it what we thought was a more equitable and reasonable contract, and we have had practically no success whatsoever along that line." (579)

As a charter member of SCPA, Mr. LaViers agreed with the purposes of SCPA (660). Being in SCPA he had no part in contract negotiations (343-4). He was not a labor-baiter, nor did he believe in resisting honest union efforts to relieve the distress of the miners who, at one time, were as much in need of a strong union as any group in the country. In fact, defendants made a point in this trial to show that Mr. LaViers was known at one time as one of UMW's best friends and took the position that a contract with the union was a stabilizing influence on the industry (490, 639).

But, the situation that developed under UMW-BCOA in the 1950's was an entirely different thing (490). Mr. LaViers did not think the contract should be rigidly applied to everyone and every type job alike without the right to negotiate changes (557-8). He fought harder than anyone else in the industry in the 1950's, consistent with the original purposes of SCPA, to have a contract with fair and equitable differentials. And he saw clearly then what was eventually to be done to the industry by an iron-bound

uniform national contract (as seen above)—the forcing of large parts of the industry to quit or to go non-union. This was what he preached for years as head of the Labor Committee of the Coal Executives Conference, an organization of leaders of the industry from all sections (666-7).

Mr. LaViers prepared and presented to the Coal Executives Conference in Chicago on May 20, 1954, a resolution which read:

> "A. The present high cost of production of bituminous coal brought about by the existing Labor Agreement has resulted in a loss of more than one-third of the market for commercial coal and has created a competitive condition both within the industry and with competing fuels that is disastrous. The present agreement imposes burdens to which other industries are not subjected.
>
> "B. A fair and equitable labor agreement could contribute an element of stability to the industry and therefore is desirable.
>
> "C. Because certain terms and conditions in the present agreement are burdensome and have provided such a profitable incentive to avoid the said terms and conditions there is a rapidly growing movement toward non-union and semi-union operations with which union commercial mines cannot compete and because if present inequalities and incentives are not adjusted they will inevitably bring further chaos to the industry. Therefore, we recommend that representatives of this organization immediately seek a conference with representatives of our employees in order to eliminate or modify these improper terms and conditions.

"D. We believe that any proposal affecting the labor agreement should be an integral part of an overall 'Plan of Survival' for the industry and should be considered and presented along with proposals on market stabilization, legislation, transportion, etc." (667-8)

Mr. LaViers was unsuccessful in getting this resolution adopted, and he proposed it so many times that "it became a matter of some jest" in the Coal Executives Conference (668).

Mr. LaViers later talked to many union representatives and others in the industry about his concern that there be changes—that the contract be fair and equitable and not so rigid, because it was forcing many companies to abandon any contract, simply not comply or go non-union, resorting to extremely low pay scales with which no union company could compete. He was, in all instances, seeking a change from the rigid contracting pattern because of its effects (557-8, 648-9).

In the late 1950's there came a change in the majority views in SCPA as to purposes and policies. Consol became influential in SCPA in 1957 or 1958 when it purchased Pocahontas Fuel Co. (653). Mr. Matthews was representing Consol in both SCPA and BCOA at the very time when he was on the BCOA special committee directing Fox when the PWC was negotiated (653, 661-2, 876, 1492). By 1960 several of the other stronger companies in SCPA were also members of BCOA (661-2).

We have shown above that Mr. Moody, head of SCPA, was talking with UMW and Illinois Association representatives about a proposed PWC sometime before the PWC of 1958 was proposed to the SCPA meeting of December 3, 1958 (1655). We quoted above what Mr. Moody told the

board members, including Mr. LaViers, about the PWC. There was no revelation to LaViers in this discussion about Mr. Moody's prior contacts as co-initiator and co-drafter of the clause. It was presented to the board as a "fait accompli" about which the SCPA board could do nothing (659, and see Plaintiff's Exh. 10, 1946). Mr. LaViers voted for signing the clause and later went along with sitting Mr. Moody on the Joint Industry Contract Committee, but there was no alternative (659). At that time plaintiff was not purchasing coal and would not have to do any boycotting (383).

But, as shown by his course of conduct, Mr. LaViers did not willingly approve of PWC. It was directly opposite to what he and SCPA had previously made basic policy with respect to the contract. An inflexible contract could not be stabilizing (640, 648-9). He vigorously questioned with SCPA legal counsel the legality of the clause—from the time he first saw it on December 3, 1958, to subsequent trips to Washington when he went to the counsel's office (490-1, 558, 634).

Even after PWC was in full sway and while the JICC of Lewis, Owens, Kennedy, Fox, Moses and Beebe were busily making findings with respect to compliance with the uniform national contract terms on the part of over 1300 companies (as will be hereinafter related), Mr. LaViers was still urging the SCPA to consider and study what could be done about the dismal economic plight of the Eastern Kentucky coal fields, as shown in SCPA minutes (659-60).

Mr. LaViers was finally able to get SCPA to set up an economic committee to study the sorry situation throughout the southern district (664-5). The minutes show that on a sub-committee under this, Mr. LaViers went to see

the international union officers to try to get modifications of the contract to relieve the critical economic situation in the southern fields (567-8, 665). This trip was unsuccessful and the SCPA minutes of November 14, 1960, show the failures of this committee to get anything done, but able only to report recommendations for future efforts, including (1) possible legislative recommendations for stabilizing the industry and (2) possible wage agreement modifications (568-70, 665-6). There was no agreement among the SCPA board members on these things (666).

This committee was able to get nothing done. Mr. LaViers told the board August 4, 1961, he did not think there could be any agreement reached and recommended the committee be dissolved. Shortly thereafter Mr. LaViers and plaintiff resigned from SCPA (666). Sometime later, in 1968, SCPA became a part of BCOA (1264-8).

We have related above how PWC came into the national contract in 1958. Rebellion in its membership ranks was affecting UMW organizing drives and coal prices were being affected by competition of coal mined by the miners displaced by the machinery forced on the organized industry. The effort was to drive this coal out of markets. The PWC is set forth in the appendix (1919-21).

There is no dispute in this case that Lewis and Kennedy of UMW, Fox of BCOA, Moody of SCPA and Beebe of the Illinois Association were working together in drafting the PWC to be inserted in the national contract. These men, plus Mr. Owens, Secretary-Treasurer of UMW later became the members of the joint committee (JICC) that policed the industry in the observance of this clause.

Paragraph D of PWC required UMW districts to report "complete" lists to the JICC of the names of "all" of the operators "whose operations are under contract with the union."

The minutes (794-835) of the JICC, whose members were the men who formulated the language of the clause, show that the districts of UMW were required to send in lists to the JICC certifying that each list was a "complete list of all operators and mines engaged in the production of bituminous coal within District ..., and whose operations are under contract to the said union" (801). These lists were added to from time to time, as new contracts were made.

The JICC sent out demands to all of the companies, without question or regard to what kind of contract they had with UMW, that they send back certification of compliance in the prescribed form (800-1)—that is, that they were paying the national contract scale and welfare royalty and had "complied fully with the other provisions of the said national agreement."

Hundreds of companies did not send back the certifications, and, after a second letter of warning, formal determinations were made and recorded of violation of the Protective Wage Clause on the part of 1328 coal operators across the country, the determination being that every such producer "has violated the Protective Wage Clause" of the 1950 contract as amended, and:

> " ... has failed and refused to comply with it obligation under such clause to certify in writing to the Committee that it is in full compliance with all of the terms and conditions of such agreement." (816-822)

The Landrum-Griffen Act with its "hot cargo" or secondary-boycott provision was passed by Congress in September, 1959. The JICC had been at work several months and was getting its enforcement program into high gear. But the new act cast doubt upon the legality of the boycott contained in Paragraph B of PWC. Because of

this JICC passed a resolution on November 4, 1959, suspending enforcement of the boycott pending clarification of the legal situation (823-5).

Ultimately JICC authorized attorneys to represent the members in any proceedings challenging PWC (Tr. 1350-1), and a NLRB case was filed. The case is still going on. It is founded on Landrum-Griffen and has nothing to do with antitrust law (1232-4, 1530).

But it was expressly understood that there was no suspension of UMW's obligations under Paragraph A of PWC (664, 827-8, 1533). The JICC met occasionally until 1964. There is no instance revealed in the minutes of any violation of PWC by UMW (822-35).

However, it is evident the interruption in the work of the committee by Landrum-Griffen was having its effect in renewal of competition and rebelling of UMW members. On March 12, 1964, Fox of BCOA wrote the president of Island Creek Coal Company, largest southern company in SCPA:

> "Dear Jim: Thank you very kindly for your letter of March 10, 1964. The matter of the competition of those in the bituminous industry who are non-signators to the National Bituminous Coal Wage Agreement and thereby not obligated to pay a higher wage scale and the 40-cent royalty has been discussed on many occasions with the United Mine Workers.
>
> "I hope that my presentations and the presentations of others in the industry to the officials of the United Mine Workers of America will make them appreciate the seriousness of this situation, not only to the coal companies, but to the United Mine Workers of America as well.

"It is most difficult to meet any demands made by the Mine Workers when there is a lack of opportunity to increase the price of coal to meet these demands." (881)

Another provision against non-union or non-complying coal was inserted shortly after the above letter, by UMW-BCOA in the 1964 Amendment to the National contract. This was the "80¢ Welfare Clause" (1375, 1378). This provision reads:

"During the life of this agreement there shall be paid into such Fund by each Operator signatory thereto the sum of forty cents (40¢) per ton of two thousand (2,000) pounds on each ton of bituminous coal produced by such Operator for use or for sale. On all bituminous coal procured or acquired by any signatory Operator for use or for sale, (i.e., all bituminous coal other than that produced by such signatory Operator) there shall during the life of this Agreement, be paid into such Fund by each such Operator signatory hereto or by any subsidiary or affiliate of such Operator signatory hereto the sum of eighty cents (80¢) per ton of two thousand (2,000) pounds on each ton of such bituminous coal so procured or acquired on which the aforesaid sum of forty cents (40¢) per ton had not been paid into said Fund prior to such procurement or acquisition." (410, 836)

Again there was a challenge of the inherent boycott of this clause under Landrum-Griffen. An NLRB case that is not concerned with antitrust law still goes on over the 80¢ Clause, UMW and BCOA contending for the legality of the clause (1232-3, 1527-30).

The 80¢ Clause was kept in the 1966 contract by UMW-BCOA, in spite of the NLRB case (1532-4). (In fact it was

kept in the 1968 contract, but that is de hors this record—see transcript page 2578).

We have commented above on the drastic unemployment and economic decline in many coal-producing areas. It remains to mention the effect of a decade of these national contracts on the industry as a whole.

By the year 1959, the operating loss of the entire corporate coal industry was $7,300,000 for that one year (420, 1515-6, 1966-7).

In contrast, Consol had net *profits after taxes* as follows:

1959	$20,523,000	
1960	19,064,000	
1961	22,824,000	
1962	24,358,000	
1963	28,569,000	
1964	33,278,000	
1965	41,167,000	(742)

Then in 1966 Consol became the first of the coal combines to be absorbed into an oil company to form the first of the so-called "energy companies."

ARGUMENT

A. THIS COURT HAS LAID TO REST ALL OF THE PRINCIPAL ARGUMENTS OF THE PETITIONERS IN ITS DECISIONS IN *ALLEN BRADLEY CO. v. LOCAL UNION*, 325 U.S. 797, *UNITED MINE WORKERS v. PENNINGTON*. 381 U.S. 657, AND *RAMSEY v. UNITED MINE WORKERS*, NO. 88, OCTOBER TERM, 1970.

All of the arguments and questions raised by petitioners other than the ones dealing with matters of procedure have been answered decisively and contrary to the contentions of petitioners in the majority opinions of this Court in *Allen Bradley Co. v. Local Union*, 325 U.S. 797, *United Mine Workers v. Pennington*, 381 U.S. 657, and *Ramsey v. United Mine Workers*, No. 88, October Term, 1970.

B. QUESTION NO. 1 RAISED BY UMW IS WRONG IN ASSERTING THAT THE JURY WAS ALLOWED TO FIND LIABILITY ON THE BASIS OF AN AGREEMENT BY THE UNION WITH ONE GROUP OF EMPLOYERS TO IMPOSE WAGE TERMS ON COMPETING COMPANIES WITHOUT A SPECIFIC FINDING THAT THE ARRANGEMENT WAS DELIBERATELY MADE AFTER A MEETING OF MINDS TO DRIVE THE COMPETITORS OUT OF BUSINESS.

UMW's question number one (and also its statement of the case at page 9) asserts that the jury was allowed to consider two theories of liability. The contention of UMW is that the jury was permitted to find the defendants liable (1) on a UMW-BCOA agreement to impose wage terms on other units, and (2) on predatory conspiracy.

The only language in the jury charge that UMW refers to in order to establish that the jury was allowed to find

liability on the first theory (no predatory conspiracy) is that part of the charge wherein the Court instructed the jury on the rights and exemptions of labor unions under the labor law. The Court charged these labor law rights fully. But the Court concluded this part of the charge with the limitations under labor law on the union's rights and exemptions. Thus, under labor law (as recited in *Pennington*) the union has a duty to bargain unit by unit and is not free to bargain with one unit about labor terms for other units; the union should retain the ability to respond in each unit without being strait-jacketed by some prior agreement with favored employers and if it does so, it loses its exemption. It is this language that UMW relies on in its first question.

But UMW does not point to any language in the charge that goes on to say that this conduct or this kind of strait-jacket agreement (without intentional, predatory, anticompetive conspiracy with business groups) makes the union and favored employers liable to a damaged competitor under antitrust law or in this case. There is no such language. The Trial Court refused plaintiff's request for such a charge.

The case at bar differs from prior cases concerning the conspiracy in that there was introduced here direct evidence in the form of minutes of association meetings, correspondence, and minutes of the Joint Industry Contract Committee showing clearly that the NBCWA was being used to knock out the coal being put into the markets by non-contract producers in order to bring about an upward spiral in wages and prices, with pressure from the coal associations that the union thus cooperate with the purposes of the major companies who dominated the associations. For instance see 836 in connection with 881 of the joint appendix; also 1655 in connection with 1661-3;

794-835. There was ample evidence in the case to establish an intentionally predatory anticompetitive conspiracy behind the course of conduct of the union and major associations with respect to the use of the NBCWA and its amendments to destroy competition.

The reason that the Trial Court refused the plaintiff's request for an instruction under which the jury could have found liability on an agreement by UMW with one set of employers to impose wage terms on other employers without predatory intent was because of the timing of this trial in the history of the development of these cases concerning combinations of union and business groups.

In *Allen Bradley* this Court held (325 U.S. 809-810):

"But when the unions participated with a combination of business men who had complete power to eliminate all competition among themselves and to prevent all competition from others, a situation was created not included within the exemptions of the Clayton and Norris-LaGuardia Acts.

" ... For if business groups by combining with labor unions, can fix prices and divide up markets, it was little more than a futile gesture for Congress to prohibit price fixing by business groups themselves ....

"Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, depending upon whether the union acts alone or in combination with business groups."

In *Pennington* this Court held:

"One group of employers may not conspire to eliminate competitors from the industry and the union is

> liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry." (381 U.S. 665-6)

This Court went on to consider in the *Pennington* case the legal effect of a particular type of agreement which it was contended had been made between the union and business groups, and this Court said at 381 U.S. 668:

> "From the viewpoint of antitrust policy, moreover, all such agreements between a group of employers and a union that the union will seek specified labor standards outside the bargaining unit suffer from a more basic defect, without regard to predatory intention or effect in the particular case. For the salient characteristic of such agreements is that the union surrenders its freedom of action with respect to its bargaining policy."

After the remand, in *Second Pennington* the plaintiffs there attempted to show both an intentionally predatory conspiracy to eliminate competition back behind the use of the national contract and also that the specific type of agreement had been made by the union which put it in a strait-jacket with respect to bargaining with those plaintiffs and that this would violate antitrust policy without regard to the purpose or effect of that type of agreement, when it actually had destroyed the business of the plaintiffs. On the appeal of that case, the Sixth Circuit said that the plaintiffs' theory in this type of case must be confined to a predatory conspiracy to drive competitors out of business. 400 F.2d at 814-5. The Supreme Court denied certiorari in *Second Pennington*, 393 U.S. 983.

It was at this point that the case at bar was tried and the Trial Court was confronted with the restriction upon theories contained in *Second Pennington*. For this reason the single theory presented here was the intentionally predatory conspiracy behind the use of the NBCWA.

It was after the trial in this case that this Court cleared up the law on the question left after the Sixth Circuit's opinion in *Second Pennington* with respect to the legal effect of the strait-jacket type of agreement if an intentionally predatory conspiracy back behind such an agreement was not proved.

But in this case the Trial Court carefully confined the issue on liability to the intentionally predatory conspiracy. There simply is no room to have confusion upon this when the charge on liability was to the following effect:

> "In order to establish a conspiracy or unlawful arrangement as claimed by the plaintiff in this case it is not necessary that the plaintiff should offer proof of a direct arrangement or executed written contract that they are entering into a conspiracy.
>
> "It is not necessary that the agreement, if any, was the result of formal action on the part of the defendants. The real question to be determined is whether or not there was a meeting of the minds or a common understanding and purpose in the requirement of the execution of the labor agreement with the intention of doing injury to the plaintiff." (1838)
>
> "The South-East Coal Company claims that it has been injured and thereby damaged by the unlawful joint acts of the defendants, United Mine Workers of America and the Consolidation Coal Company. This alleged wrongful action is that the two defendants had been guilty of a conspiracy against the plaintiff.

"A conspiracy is an arrangement or an agreement or plan between two or more individuals or, as in this case, corporate entities, to commit an unlawful act, or to commit a lawful act, in an unlawful way.

"In other words, the plaintiff claims that this coal company, through its officers and agents, had a plan or an agreement, the officers and agents of the labor union, to require all coal producers in Eastern Kentucky coal fields to execute a contract with the United Mine Workers ...." (1843-4)

"You are instructed that if you believe there was an industry-wide collective bargaining agreement, whereby employers and the union agreed on the wage scale that exceeds the financial ability of some small operators, including the plaintiff, to pay, and that the agreement was made for the purpose of forcing some employers, including the plaintiff, out of business, or injuring its business, and you believe that the defendants, the Consolidation Coal Company and the United Mine Workers, deliberately entered into and participated in such an arrangement, and that the result of such an arrangement was the sole cause of damage, if any, to the plaintiff, then you will find for the plaintiff.

"If you do not so believe, you will find for the defendants." (1844)

"In other words, it is claimed by the plaintiff the defendants fixed the wages and Welfare Fund royalties so high in 1950 by the National Bituminous Coal Wage Agreement and the amendments thereto that the small companies, including this plaintiff, could not pay them and continue to operate successfully. And that the defendants knew that the small companies, including the plaintiff, could not pay the fixed wages and Welfare

Fund royalties, and that thereby the trade and competition offered by the small companies, including the plaintiff, to the larger coal producing companies, including the defendant Consolidation Coal Company, would be eliminated by putting the small companies, including the plaintiff, out of business.

"It is for you to determine from all the evidence and all reasonable inferences which may be drawn from the evidence whether or not these defendants had such an agreement or meeting of the minds for the intent and purpose of unreasonably restraining trade and monopolizing the coal industry in the eastern Kentucky locality by driving the small companies, including the plaintiff, out of business.

"You are instructed that the execution of the written contract is not of itself or per se a violation of the law.

"In order for the contract to be unlawful you must believe that its execution by the defendants was for the purpose and with the intention, among other things, of destroying or injuring the business of the plaintiff." (1845-6)

It is to this kind of conspiracy that the language of the Court of Appeals (referred to at pages 10-11 of UMW's petition) is directed. This kind of conspiracy was held to violate the Sherman Act in both *Allen Bradley* and *Pennington*. It is a violation whether or not it is called "per se" or "because of predatory intent" or whatever.

C. UMW'S SECOND QUESTION AND CONSOL'S SECOND QUESTION ARE WRONG IN CONTENDING THAT THE JURY WAS CHARGED IT COULD FIND LIABILITY WITHOUT FINDING AN INTENTIONALLY PREDATORY CONSPIRACY.

We submit that such parts of the charge as we have quoted just above demonstrate the incorrectness of the contentions made in the second questions of each of the petitions. The jury was clearly told that if there was no intentionally predatory conspiracy behind the use of the national contracts the finding must be for the defendants.

The point made by UMW's second question seems to be boiled down to the last paragraph at page 25:

> "Without some analysis from the judge of how the contract's provisions could have operated within the bargaining unit to injure competition, or some requirement that they find an additional agreement to impose its terms outside the bargaining unit, the jury was left at large to impose liability on the basis of a dislike of the union's motives, a result which the labor exemption was expressly designed to prevent."

We submit that this contention has no practical application in fact to the issue presented and found by the jury as illustrated by the quotations above from the charge.

Consol, at page 13-18 of its petition and dealing with its second question, picks language out of context from the charge of the District Court and opinion of the Court of Appeals to make it appear that the jury was permitted to decide the basic question of liability solely upon the parallel course of conduct of signatories to the NCBWA, and Consol contends that the jury was allowed "to conclude that 'having in mind' or having 'conscious knowledge' that

a legal agreement could harm a competitor was the equivalent of actual agreement" (Consol petition, page 13).

Even if Consol's analysis of the charge were correct, Consol would be faced with the holding in *Interstate Circuit v. United States*, 306 U.S. 208, 227:

> "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. *Schenck v. United States*, 253 F. 212, 213, affd, 249 U.S. 47, [63 L. Ed. 470, 39 S. Ct. 247]; *Levey v. United States*, 92 F.2d 688, 691. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."

But the very language used here by Consol, when put back into context, means the jury had to determine the purposes of the petitioners, their actual intent, with respect to whether the NBCWA would "deliberately" and with "agreement or meeting of minds" be *used* to drive competitors out of the markets so the defendants would profit.

As stated, Consol merely takes isolated words out of context and does not discuss at all the main part of the charge with respect to the principal issue submitted to the jury. Petitioners make no reference to such parts of the charge as we have quoted above.

The isolated language chosen and relied upon by petitioners from the charge to the jury and the opinion of the Court of Appeals should be put back in context and taken in conjunction with the foregoing main part of the charge

with respect to the issue of liability. The issue sought to be raised under this question by petitioners is unreal and not related to the full import and meaning of the charge.

D. UMW'S FIRST QUESTION AND CONSOL'S FIRST QUESTION ARE WRONG IN CONTENDING THAT AN INTENTIONALLY PREDATORY CONSPIRACY BETWEEN A UNION AND BUSINESS GROUPS TO DESTROY COMPETITION MAY MERELY FORFEIT ANTITRUST EXEMPTION WITHOUT ESTABLISHING LIABILITY TO AN INJURED COMPETITOR.

As shown above, the issue on liability presented to the jury was whether the defendants entered into an intentionally predatory conspiracy to destroy competition in the bituminous coal industry. Under the District Court charge, no other agreement, understanding or contract of any type would be sufficient to impose liability on the petitioners. In a decision which has stood for over 25 years without change by the Congress, this Court held in *Allen Bradley* that such a predatory conspiracy, even though it involved a labor union, violated the Sherman Act and the defendants were liable therefor. The same rule was recognized in *Pennington*.

The District Court here refused to charge the jury that the defendants could be held liable for some other or different type of conspiracy or agreement, such as an agreement to impose certain wage terms on other bargaining units without specifically proving behind it a conspiracy and purpose to destroy the competitors in those units. All of the contentions and arguments raised by the petitioners concerning the latter type of agreement have absolutely nothing whatsoever to do with the actual jury finding in the case now at hand.

This kind of conspiracy violates the Sherman Act under the applicable decisions, and there remain no arguments, with respect to this type of conspiracy, that it can simply be held to result in a forfeiture of union exemption and not be a violation of the act for which the defendants are liable to a damaged competitor.

The petitioners have advanced no argument that would indicate that the obviously just and necessary rule in *Allen Bradley* should be changed after all these years when Congress has not chosen to change it.

E. THE RELIANCE BY CONSOL UNDER ITS THIRD QUESTION UPON THE *NOERR* AND *PENNINGTON* DOCTRINE PROTECTING THE RIGHT TO PETITION IS CLEARLY MISPLACED.

Under its third question, Consol relies on *Eastern Railroad Conference v. Noerr Motors*, 365 U.S. 127 and *United Mine Workers v. Pennington*, 381 U.S. 657. Consol says that the jury was charged that the labor contracts considered by themselves were lawful and then says on page 19 of its petition:

> "It is submitted that those cases (*Noerr* and *Pennington*) stand for the proposition that if an action is legal, then an anticompetitive intent or purpose will not make it illegal."

But clearly the doctrine of those cases was founded upon the constitutional right of citizens to petition their government representatives. There is nothing at all in a predatory conspiracy to use a labor union to drive competitors out of an industry (as distinguished from petitioning the secretary of labor to establish a prevailing wage under the Walsh-Healy Act as in *Pennington*) that is related in any fashion to the constitutional right to petition an individual's government representative.

Under ordinary antitrust law where constitutional rights are not thus involved, the long established rule is that which is stated in *American Tobacco Company v. United States*, 328 U.S. 781:

> "It is not the form of the combination or the particular means used, but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful."

and more specifically this Court said in *United States v. Reading Co.*, 226 U.S. 324, 357:

> "It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. *Aikens v. Wisconsin*, 195 U.S. 194, 206. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other States, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful."

And with particular reference to the kind of conspiracy charged here, this Court said in *United Mine Workers v. Pennington*:

> "One group of employers may not conspire to eliminate competitors from the industry and the Union is liable with the employers if it becomes a party to the conspiracy. This is true even though the Union's part in the scheme is an undertaking to secure the same

wages, hours or other conditions of employment from the remaining employers in the industry." (381 U.S. 665-666)

F. CONSOL'S CONTENTION UNDER ITS QUESTION NO. 4 AND UMW'S CONTENTION UNDER ITS QUESTION NO. 3 THAT THE TRIAL COURT FAILED TO GIVE A CHARGE UNDER THE CLEAR PROOF RULE ADEQUATE TO PROTECT THE RIGHTS OF BOTH DEFENDANTS IS WITHOUT BASIS IN FACT. THE TRIAL COURT GAVE BOTH DEFENDANTS THE BENEFIT OF A GENEROUS INSTRUCTION UNDER THE CLEAR PROOF RULE OF THE KIND THEY THEMSELVES REQUESTED.

Predatory conspiracy was the illegal act charged in this case.

The District Court charged the jury " ... such an anti-competitive conspiracy as claimed by the plaintiff must be established by clear proof." (1836)

The Court finished off charging the jury what clear proof means at a place in the charge where there can be no doubt that it had greater impact than if it had been buried in the charge. Shortly before the jury was sent to deliberate the Court left defendants' own version of clear proof strong and fresh in the minds of the jury as follows:

"Members of the jury, the Court has already charged you that the issue of alleged conspiracy in this case must be decided upon clear proof, that is, the plaintiff must produce clear proof of the alleged conspiracy. Clear proof means clear, unequivocal and convincing proof that the defendants participated in, actually authorized the alleged conspiracy or ratified it after having actual knowledge thereof." (1915)

The foregoing charge is essentially the charge on clear proof that was invited by the defendants (1755, Consol's request No. 28; 1741, UMW's request No. 16). It extends beyond the requirements of the majority opinion of this Court in *Ramsey*. We submit it also satisfies the minority opinion in *Ramsey*.

If the Court will recall, in *Ramsey*, UMW has argued that where a union was a defendant all elements of the alleged agreement or conspiracy itself must be proved by clear proof (as it had successfully argued in *Second Pennington*), but after this Court granted certiorari in *Ramsey*, and realizing the weakness of its previous successful arguments along this line, UMW switched to the contention that Section 6 really was limited to proving authorization, ratification or participation in acts of agents; but that the Trial Court in *Ramsey* had actually so limited the rule.

Petitioners yet again raise this matter of the clear proof rule, but we submit that the foregoing portions of the charge of the Court to the jury adequately protected both the defendants exactly in the way they were seeking to be protected.

Realistically, and referring to our Statement of Facts above, we submit that it would truly be impossible to pick out any of the acts of agents in this case which was not clearly authorized by the respective principals.

The language in the Court of Appeals opinion concerning the clear proof rule was aimed at the arguments which existed before UMW switched its contentions with respect to clear proof in the *Ramsey* case. In cases before *Ramsey*, UMW's argument was not aimed primarily at specific language in Section 6, but was more related to the exemption provided unions under antitrust statutes when they act alone. UMW had urged that when a union was involved as a defendant in an antitrust case, a new standard of proof

should be fashioned for determining the issues of liability. But this Court rejects such contentions in ***Ramsey*** saying:

> "Nor do we discern any basis for ourselves fashioning a new standard of proof applicable in antitrust actions against labor unions."

In similar fashion and with considerable elaboration of its reasoning, the Court of Appeals reaches the same result that simply because a union is involved does not mean that the Court should fashion a new rule of liability in antitrust conspiracies, over and beyond the language of Section 6.

But the fundamental question of whether or not the charge to the jury adequately protected the defendants must be answered in the affirmative as shown from the foregoing quoted portions of the charge.

This Court has decisively and clearly resolved all questions concerning the meaning and extent of the clear proof rule in ***Ramsey*** and prior cases, and it would serve no purpose to review this question again at this time.

G. THE COURT OF APPEALS HAD CORRECTLY AND FULLY ANSWERED ALL OF THE CONTENTIONS RAISED BY THE FIFTH QUESTION IN CONSOL'S PETITION AND THE FOURTH QUESTION IN UMW'S PETITION CONCERNING ALLEGED IRREGULARITY IN PROCEDURE IN THE DISTRICT COURT.

The petitioners insert a conglomeration of questions concerning procedural matters in this case all of which were fully answered by the Court of Appeals.

1. It Was Not Error to Allow Proof of the Effects of Defendants' Conduct.

Under Consol's first point under its fifth question, it asserts that the trial developed into a contest "between the populus of Eastern Kentucky on the one hand, and UMWA and petitioner on the other." There *was* considerable presentation of the effects and consequences of the defendants' course of conduct which clearly was creating distress to the Appalachian coal mining communities, such as those in Eastern Kentucky. But this kind of evidence is necessary in this case as in any other antitrust case.

In this case the plaintiff relied on both direct proof of conspiracy and circumstantial evidence based largely on the effects and consequences of the course of conduct of the defendants. The Supreme Court warned in *United Mine Workers v. Pennington*, *supra*, that in this type of case the circumstantial evidence would have to extend beyond merely showing that the defendants suspected that the weakest units of the industry could not conform with the national contract labor terms. The effects and consequences would have to be more radical than that. The proof in this case did go beyond those limited conditions, both from the national viewpoint and with respect to Eastern Kentucky.

In addition, it is to be recalled that proof of public injury in a Sherman Act case was, up to very recently, not only permissible but was mandatory. Even today many courts require such proof in a case not based on a per se violation, although such public injury "need not be nationwide in geographical scope" (see *Reliable Volkswagon S & S Company v. World Wide Auto Corp.*, 182 F. Supp. 412, 425-6; *Continental Ore Company v. Union Carbide Corp.*, 370 U.S. 690, 708). Plaintiff complied with this requirement also particularly showing the resulting situation in Eastern Kentucky.

Also, we submit that all of this proof was admissible in the face of the contentions of the defendants. Proof that UMW's course of conduct was benefiting Consol to the extreme and restraining, on the other hand, the trade and commerce and competition of great areas of the coal industry was certainly pertinent to the defense that the union's conduct was unilateral, not to benefit Consol. Similarly, proof as to the effect on vast unemployment of union members, both nationally and in Eastern Kentucky was pertinent when UMW's principal defense was that it was acting unilaterally for union purposes alone to benefit union members.

In the face of such contentions by the defendants, it was inevitable and absolutely necessary that the plaintiff submit this type of proof in presenting its evidence of a predatory conspiracy to destroy competition in the bituminous coal industry.

2. The Defendants Were Protected as to Alleged Hearsay Evidence.

The second point raised under the fifth question at page 23 of the Consol petition deals with the alleged failure of the District Court to charge the jury as to certain hearsay evidence (evidence which was actually taken in regular discovery interrogatories from the official records of one of the defendants). The Court of Appeals very adequately and fully answered this contention in its opinion under the heading "E. Instructions Respecting the Use to be Made by the Jury of Certain Hearsay Statements."

It is also to be observed in this connection that during the course of the trial, the District Court very fully and repeatedly charged the jury, as this evidence was presented, the full protections that a defendant is entitled to as to such evidence, and this was to the complete satisfaction of both defendants (376-8, 423-4, 430, 880, 1525).

3. The Jury Charge Was Proper Without Including the "Equal Hypothesis Rule."

The third contention under Consol's fifth question at page 23 of its petition concerns the alleged failure of the Court to charge the jury as to the so-called "equal hypothesis rule." The Court of Appeals has very fully answered this contention in its opinion under the heading "D. Equal Hypothesis Rule," under the part of the opinion dealing with alleged errors in instructions.

4. The Evidence Was Sufficient to Support the Verdict.

Under the fourth contention made under the fifth question raised by Consol at page 24 of its petition, the petitioners question the sufficiency of the evidence by pointing to the District Court's denial of motions for directed verdict and motions for judgment n.o.v. based on that ground. However, it is submitted that our statement of the facts, supra, shows quite clearly that there can be no question in this case that there was ample and sufficient evidence to support the jury verdict of liability.

5. There Were No Irregularities Pertaining to the Jury That Prejudiced the Defendants.

The fifth contention made by Consol under its fifth question at pages 24 and 25 of its petition and the fourth question raised by the UMW petition relate to alleged irregularities concerning the jury in the course of the trial. ***The record shows that UMW's statement of these matters in its petition implies irregularity that did not exist.*** The Court of Appeals (as well as the District Court) has very fully answered these contentions and has shown that they are not substantial grounds of complaint and certainly

could not be prejudicial, treating these matters in the third main part of its opinion under the heading "Alleged Irregularities with Respect to the Jury."

6. The Jury Charge Was Not Generally Inadequate or Prejudicial.

The final contention made by Consol under its fifth question at page 25 of its petition is that the charge generally was inadequate, confusing and prejudicial. We submit that this is an incorrect analysis of the charge of the Court in this case. We think that the trial court here did an excellent job in conveying to the jury the nature of the issues that it was supposed to decide. This jury was not a group of lawyers or economic experts, but 12 citizens made up of a broad cross-section of all of the communities of Eastern Kentucky. The defendants had demanded that the Court select the jury, not just from the local division, but from all divisions of Eastern Kentucky (much of which was not in the coal mining area) running from Tennessee to Ohio and from the middle part of the state to Virginia, and the Court granted this wish (33, 36). The Court was talking to this broad cross-section of people about a long and complex trial when he gave the charge.

Before giving the charge and during the course of the trial in colloquies with counsel outside the presence of the jury, the Trial Judge showed his concern that the jury clearly understand the questions it was to decide. His strongly expressed feeling was that it would be unfair to both sides if the issues were not stated simply and clearly and if jurors became confused by a morass of meticulous and argumentative instructions. He made this very plain to counsel. The Learned Trial Judge has had considerable experience on the bench and in long, complex cases and

knows the confusion in which the jury is apt to be left by long-winded charges. His comment was:

> "My idea about these instructions, you can just over-instruct a jury. This is a complicated matter and I can narrow it down and give a sharp issue to them to decide---it is easy to get confused on many things in a long case." (1526-7)

The Court later was disappointed that he did not get too much help from counsel on their suggested instructions in keeping the issues clear. He was particularly disappointed that the requests of the defendants would have the Court argue defendants' case to the jury and would leave the jury in a fog (1584-6). He said again:

> "I do want to impress upon you the idea which I believe is imperative in this case—to try and draw a sharp issue for the jury to decide, and not have them go out there into the jury room in such a maze or quandry that they feel like they are not competent to decide the case—because they are, and the issue is sharp." (1589-90)

Subsequently, the Court advised counsel the nature of the charge the Court intended to give including the issue to be answered by the jury (1690-7). This was substantially the charge given the jury, except for some preliminary explanations given the jury.

Considering the help (or lack thereof) given in the requested charges we believe the Court has done the best job possible in presenting the case in form that would be valid and legal without giving the extreme overstatements of defendants' case insisted upon by defendants (1736-1766). Defendants criticized and objected to every effort of the Court to state the case without themselves coming up with

requests that would be correct, fair, clear, cor ise *and relevant to the single theory of predatory consp racy presented to the jury.*

The question here is whether the charge *cons idered as a whole* was fair and adequate without substanti l prejudice to defendants. Flaws can be found in almost an y charge by separating certain paragraphs from the whole . Thus, the charge must be considered as a whole to det rmine whether it gave the jury a correct understanding of the propositions which they are to decide and the pe tinent principles of law which shall guide them in their decision. See the numerous cases at Vol. 49, *Federal Practice Digest*, Trials, Section 295(1).

CONCLUSION

For the foregoing reasons, respondent submits that the Petitions for Writs of Certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1479

CONSOLIDATION COAL COMPANY,

Petitioner

v.

SOUTH-EAST COAL COMPANY,

Respondent

REPLY BRIEF ON BEHALF OF PETITIONER, CONSOLIDATION COAL COMPANY

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IN THE

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OCTOBER TERM, 1970

NO. 1479

CONSOLIDATION COAL COMPANY,

Petitioner

v.

SOUTH-EAST COAL COMPANY,

Respondent

REPLY BRIEF ON BEHALF OF PETITIONER, CONSOLIDATION COAL COMPANY

Preliminary Statement

The basic error in Respondent's Brief in Opposition is that it completely ignores the fact that this case involves complex issues relating to the interplay of the national labor policy and the national antitrust policy. In this respect, Respondent echoes and reflects the attitude of both the District Court and the Court of Appeals for the Sixth Circuit in this case.

Respondent's Brief in Opposition and the action of the Courts below are founded upon the mistaken proposition that this case essentially involves only the application of the antitrust laws. Not once in the charge of the District Court was any mention made of the *duty of an employer or group of employers to bargain collec-*

tively in good faith with a Union to attempt to arrive at an agreement. This omission especially cries out for recognition in the face of the uncontradicted evidence that the alleged conspiracy here actually achieved the Congressionally-mandated purpose of the Labor Management Relations Act (29 U.S.C. §§ 141, 151) by achieving industrial peace in an industry which, during the Second World War, was seized five times by the United States Government in order to assure continued coal production (Jt. App. pp. 986-87).[1]

Despite detailed requests for instructions (Jt. App. 1749-50), the District Court never instructed the jury with respect to the employer's *duty* to bargain collectively and arrive at an agreement, never mentioned the relevant Federal labor statutes, but merely indicated, negatively, that under the Clayton Act and "the LaGuardia Act" [sic] it was *not unlawful* for Unions and employers to bargain collectively (App. C. pp. 87a, 88a). This was, at best, a singularly odd way to state a Congressionally-mandated policy.

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1. Herein, the indication, for example, to "Jt. App. pp. . . .", shall refer to the Joint Appendix in the United States Court of Appeals for the Sixth Circuit, which has been certified to this Court. Reference to the Appendices, for example, to "App. C. p. . .a" refers to the Appendices attached to Consolidation Coal Company's (hereinafter "Consol") Petition for a Writ of Certiorari filed herein.

ARGUMENT

A. Reply in Support of Consol's Reasons No. 1 and No. 2 for Granting the Writ.

This case was actually tried for the Respondent in the District Court on the theory that the Protective Wage Clause in the 1958 National Bituminous Coal Wage Agreement (hereinafter "NBCWA") amounted to a "strait jacket/boycott" agreement depriving the United Mine Workers of America (hereinafter "UMWA") of its freedom of action. The case was argued to the jury by Respondent's counsel on that theory (Jt. App. pp. 1786-89).

Despite detailed and alternative requests for instructions (Jt. App. pp. 1756-57) concerning the proper method of interpreting the Protective Wage Clause (hereinafter "PWC"), the District Court merely instructed the jury that the PWC (as well as the 80-cent clause which replaced it) was *legal,* but that if the agreement were entered into with the intent or *"if they had that in mind"* that it could have an adverse affect upon the Respondent, it would be a violation of the antitrust laws (App. C. pp. 91-92a). The Court of Appeals for the Sixth Circuit affirmed and made a forfeiture of exemption from the antitrust laws equal to a *per se* violation thereof (App. A. pp. 11-12a), all dependent on specific predatory intent (App. A. p. 9a), which it equated with *conscious knowledge* (App. A. p. 27a) of possible harm to a competitor.

Now the Respondent does not even attempt to reconcile that charge with the decisions of this Honorable Court but here takes the position that all that is necessary to impose liability is a finding of *predatory*

intent, without any underlying "strait jacket" agreement of the type discussed by this Court in *United Mine Workers v. Pennington*[2] and *Ramsey v. United Mine Workers.*[3] Moreover, this position wholly ignores the distinction between forfeiture of the exemption and establishment of an antitrust violation. This is a new *per se* violation with a vengeance.

[In this connection it may be noted that in the cases cited at page 4 of Respondent's Brief, the facts and issues were not the same as in the present case. In all of the cases cited, there was evidence of an attempt by UMWA to monopolize the [illegible] dence is contained in this record. Furthermore, in *Tennessee Consol*[4] the jury was given a special interrogatory with respect to their construction of the Protective Wage Clause and found it to be illegal. In this case the District Court instructed the jury that the provision was legal but could nevertheless be the foundation of an antitrust violation. Thus, the cases cited by Respondent do not support its contention.]

As a result of this Honorable Court's Opinions in *First Pennington* and *Ramsey,* as well as the decisions of the District Court[5] and the Circuit Court[6] in *Sec-*

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2. 381 U.S. 657 (1965); hereinafter "First Pennington." References to the Pennington case on remand are referred to as "Second Pennington"; see footnotes 5 and 6, infra.

3. 39 U.S.L.W. 4245 (1971); hereinafter "Ramsey".

4. Tennessee Consolidated Coal Co. and Grundy, et al. v. United Mine Workers, 416 F.2d 1192 (6th Cir. 1969); cert. denied, 397 U.S. 964 (1970).

5. 257 F. Supp. 815 (E.D. Tenn. 1966).

6. 400 F.2d 806 (6th Cir. 1968); cert. denied, 393 U.S. 983 (1968).

Argument.

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issues were as follows: (1) whether there was
ment or equivalent commitment by UMWA
labor standards outside the bargaining
whether such a "strait jacket" agreement, if
made with the predatory intent or purpose
competitors out of business; (3) whether such
jacket" agreement, if found, was unreason
violation of the antitrust laws.

In the instant case, the Lower ent now
pletely ignored issues 1 and 3, and F case and the
seeks to vindicate the jury's result in t basis that a
rulings of the Lower Courts on the s of a plaintiff
partial resolution of issue No. 2 in fav the imposition
(Respondent here) is sufficient to justif against both
of over $7,500,000.00 of antitrust liabil co-conspirator
a Union and an employer named as a ndent argues
with the Union. In this regard, Res ry conspiracy
that a finding of an intentionally preda ient to justify
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a jury finding that the Union has hat the Union
emption from the antitrust laws, *and* or with it have
and the employer joined as a co-conspir antitrust laws.
committed a substantive violation of th

rgues, and the

Respondent's Brief in Opposition s case involved
Courts below acted, on the basis that th fendants acted
the single, simple issue of whether the on page 37 of
with "predatory intent". For example

its Brief, Respondent states that ". . . the single theory presented here was the intentionally predatory conspiracy behind the use of the NBCWA."

With respect to the issues in the case, the following statement on the Record by the Trial Court is pertinent:

> "My idea about these Instructions, you can just overinstruct a jury. This is a complicated matter and I think I can narrow it down and give a sharp issue to them to decide. * * * It is easy to get confused on many things in a long case." (Jt. App. pp. 1526-27).

The jury was instructed (Appx. p. [illegible]):

> "As I said before, I don't want you to think because of this length of time that we have had to try this case, the number of witnesses and the number of exhibits, and the number of figures, the hundreds of figures used here, and the testimony that has been read here for hours at a time from transcripts and from depositions, that you are so confused that you don't know what it is all about. It does sound like such a magnanimous big operation that it is hard to find out. But *the issue* in this case, notwithstanding all of that, is very, very sharp. I assure you that before you go out of that jury box that you will understand what it is you have to decide." (Emphasis supplied.)

This *was* a complicated matter. It was a case involving the national labor policy, the labor exemption from the antitrust laws and basic and fundamental considerations of the antitrust laws themselves. It allegedly involved a charge of restraint of trade under Section 1

of the Sherman Act. It also involved the construction of PWC (even though the Courts Below and Respondent now attempt to disavow that), and the rules of construction of contracts.

In an effort to compress all aspects of the case into the *so-called* single, "sharp issue", the District Court and Respondent confused "agreement" with "predatory intent". The District Court asserted (App. B. pp. 63-64a) that its charge ". . . presented to the jury *a sharp, clear issue for their determination.*" [Emphasis supplied.] The statements that there was *"a* sharp, clear issue" [emphasis supplied] and *"the issue* . . . is . . . sharp" [emphasis supplied] are tracked by the Respondent's present contention that the *only* issue involved was that of "predatory intent". When the District Court asserts that there is only "*a* sharp, clear issue" [emphasis supplied] and *"the issue* . . . is . . . sharp," [emphasis supplied], and that issue is "predatory intent" and that is coupled with the Court's instruction that the collective bargaining agreement itself was legal, it is evident that grievous error has been committed, especially when "conscious knowledge" is equated with "intent".

This approach is also expressly set forth in the Opinion of the Sixth Circuit where the Circuit Court held that if a legal and valid collective bargaining agreement were entered into with the " . . . *conscious knowledge* or intent that it would be used to drive competitors out of business . . . , then a violation of the antitrust laws has occurred." (App. A. p. 27a). (Emphasis supplied.)

No matter how this concept is presented, what it amounts to *is* that a legal and valid collective bargaining agreement entered into in compliance with the Congressionally-mandated labor policy may be found to be the basis of a Union's forfeiture of its exemption from the antitrust laws *and* a substantive *per se* antitrust violation merely because of "conscious knowledge" of potential harm to a competitor of one of the parties.[7]

It is respectfully submitted that such a result was never intended by this Honorable Court and — if allowed to stand — will seriously and adversely affect the future of collective bargaining throughout the country. Every employer or group of employers and every union will have to bargain to impasse in order to attempt to avoid potential antitrust liability. The fear of antitrust liability will frustrate the march—vigorous or halting—towards industrial peace.

In the Opinion of Mr. Justice White in *Ramsey,* it was pointed out that petitioner therein was asking this Court to reconsider its holding in *First Pennington* and

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7. An outstanding example of the impact of permitting a legal agreement to be used as the foundation of an antitrust violation is pointed up at pages 13 and 14 of Respondent's Brief in Opposition. There Respondent argues that Consol "boycotted" South-East Coal Company. Respondent also contends that Paragraph B of PWC was an "illegal boycott" agreement. Yet this is the same paragraph which has been stated by *both* the District Court and the Court of Appeals to be *legal.*

So compliance with the legal agreement is — according to Respondent's Brief in Opposition — evidence of illegality. That the lower Courts here permitted and approved such a result is grounds for granting a writ of certiorari.

other cases that *unilateral conduct* by the Union of the type protected by the Clayton and Norris-LaGuardia Acts does not violate the Sherman Act even though it may restrain trade. 39 U.S.L.W. 4245, at 4248. This Honorable Court specifically declined to reconsider that issue in *Ramsey*. Insofar as Respondent herein is really contending that a finding of intent or purpose—which may be derived from "conscious knowledge" of possible harm to a competitor—is sufficient to impose liability even in the absence of a so-called "straight jacket" agreement by the Union, it would appear clear that Respondent is asking this Court once again to reconsider and impliedly recognize the principle that unilateral conduct by the Union—if accompanied by an improper motive or intent, which, in turn, can be derived from "conscious knowledge" of possible harm to a competitor —may violate the Sherman Act.

Realistically, every "first target" employer *knows* he establishes a pattern. If Respondent prevails herein, labor chaos will be the inevitable result.

The denial of a writ of certiorari in this case would, therefore, amount to an implied reversal of this Honorable Court's rulings in *First Pennington* and *Ramsey* with respect to unilateral action on the part of a labor union. It would also constitute a recognition by this Court of the Circuit Court's unwarranted and improper holding that forfeiture of the labor exemption from the antitrust laws is to be equated with a substantive violation of the antitrust laws, thus eliminating any separate consideration by the fact-finder of such issues as the well-recognized rule of reason.

Argument.

It is believed urgently necessary for this Court to determine whether a forfeiture of exemption from the antitrust laws and a *per se* violation of the antitrust laws can be justified on the basis of a finding of predatory intent or purpose with respect to an admittedly legal agreement which arises out of a Congressionally-mandated duty to bargain and relationship between the parties to that legal agreement. It is also necessary to determine whether "conscious knowledge" of potential harm to a competitor supplies the requisite intent.

It is to be borne in mind here that the District Court specifically held that the Protective Wage Clause of the NBCWA was legal (App. C. p. 91a). It is also to be borne in mind that all legal and administrative tribunals which have passed on this question have determined that both PWC and the subsequent 80-cent clause are legal.[8]

To the extent that this Honorable Court has characterized a collective bargaining agreement entered into

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8. Ramsey v. United Mine Workers, 265 F. Supp. 388 (E.D. Tenn. 1967); affirmed by an equally divided Court, 416 F.2d 655 (6th Cir. 1969); reversed and remanded on other grounds, 39 U.S.L.W. 4245 (1971); Lewis v. Pennington, 400 F.2d 806 (6th Cir. 1968); cert. denied, 393 U.S. 983 (1968); International Union, United Mine Wkrs. of Am. v. N.L.R.B., 399 F.2d 977 (D.C. Cir. 1968); W. A. Boyle, et al. and Arthur J. Galligan, 179 NLRB No 80, 1969 CCH NLRB ¶ 21,336 (1969); and International Union, United Mine Workers of America, et al. and Dixie Mining Company, 188 NLRB No. 121, 1971 CCH NLRB ¶ 22,787 (1971).

The District Court *never even read* PWC to the jury —but read the 80-cent clause (App. C. p. 94a), which is *not* the basis of the Respondent's claim.

between a Union and an employer or group of employers, Petitioner Consol submits that this Honorable Court has said (*First Pennington* and *Ramsey*) that where a Union, by agreement with one set of employers insists on maintaining in other bargaining units specified wage standards ruinous to the business of those employers, such agreement *is not exempt from the antitrust laws.* Whether or not such a "strait jacket" type of agreement—which deprives the Union of its freedom of action —amounts *only* to a forfeiture of exemption, it is clear that the basic agreement must be invalid in the sense of being a "strait jacket" agreement *before any other questions are raised*—such as "predatory intent", and "reasonableness".

This Honorable Court, in *Allen Bradley,*[9] affirmed the Lower Court's holding that the Union had conspired in violation of the antitrust laws. However, it is to be noted that in that case the District Court had concluded specifically and separately that the Union's actions and activities therein were not exempt from the antitrust laws and also that the Union's action constituted a violation of the antitrust laws. In this regard, this Honorable Court's attention is invited to paragraphs 5 and 23 of the conclusions of law stated in the Opinion of the District Court in *Allen Bradley,* 51 F. Supp. 36, at 41-42 (S.D. N.Y. 1943). It is evident, therefore, that the Lower Courts, in *Allen Bradley,* separately considered the issue of exemption and the issue of a substantive violation, unlike the Lower Courts in the instant case, and that no new *per se* violation was intended or declared in that case.

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9. Allen Bradley Co. v. Local Union, 325 U.S. 797 (1945).

Argument.

By equating a forfeiture of Union exemption with a *per se* substantive violation of the antitrust laws, the Lower Courts in this case have deprived Petitioners herein — and others — of any opportunity to have the fact finder determine whether the alleged acts and conduct of the parties constituted a substantive violation of the antitrust laws. For this reason alone, certiorari should be granted by this Honorable Court.

The actions of the Courts below in ignoring the distinction between the forfeiture of the labor exemption from the antitrust laws and the violation of those laws were made worse by their equation of "having in mind" and having "conscious knowledge" that a legal collective bargaining agreement could harm a competitor with an actual agreement constituting a *per se* violation.

In this respect Respondent's answer is to cite and quote (p. 41 of Respondent's Brief) from the case of *Interstate Circuit v. United States,* 306 U.S. 208, at 227 (1939). However, that case has been discredited or severely limited by *Theater Enterprises, Inc. v. Paramount Film Distributing Corp.,* 346 U.S. 537 (1953). If there is some area of confusion with respect to the teaching of those two cases, then clearly the attention of this Court is merited and certiorari should be granted.[10]

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10. Despite the teaching of this Honorable Court in Theater Enterprises, Inc., it would appear that the doctrine of "conscious parallelism" is still being utilized (see, e.g. Goodyear Tire & Rubber Co., et. al. F.T.C., C.C.H. T.R.R. ¶ 19,522.) and merits the attention of this Honorable Court.

B. Reply in Support of Consol's Reason No. 3 for Granting the Writ.

The significance of the *Noerr-Pennington*[11] cases is that the actions there called into question were admittedly legal and a predatory intent was not permitted to stigmatize them. That this issue is very much alive today and worthy of this Court's consideration and guidance is attested by the following cases in various parts of the country which have presented very similar issues: *Woods Exploration & Producing Company, Inc. v. Aluminum Company of America,* Nos. 28763 and 29487 (5th Cir. January 5, 1971); and *Trucking Unlimited v. California Motor Transport Co.,* 432 F.2d 755 (9th Cir. 1970).

C. Reply in Support of Consol's Reason No. 4 for Granting the Writ.

In *Ramsey,* supra, this Court held that the "clear proof" rule in Section 6 of the Norris-LaGuardia Act (29 U.S.C. §106) applies both to employee and employer organizations. 39 U.S.L.W. at 4247, note 8. In this case, the Circuit Court held that the "clear proof" rule applies only to labor organizations and not to employer defendants, such as Consol (App. A. pp. 6-7a). For this reason alone, a writ of certiorari should be granted to review the judgment of the District Court and the Circuit Court in this case.

The Brief filed in Opposition ignores completely the obvious inconsistency between the Circuit Court's ruling in this case and this Court's holding in *Ramsey.*

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11. Eastern R.R. Conference v. Noerr Motors, 365 U.S. 127 (1961); reh. denied, 365 U.S. 875 (1961); and United Mine Workers v. Pennington, supra.

D. Reply in Support of Consol's Reason No. 5 for Granting the Writ.

It is appropriate to advert to the Respondent's assertion (Respondent's Brief, p. 40) that Petitioner Consol has taken portions of the District Court's charge out of context. As to this, Petitioner Consol reiterates its urgent request that this Honorable Court examine the Court's charge in toto (The charge of the District Court is set forth in full in Appendix C to Consol's Petition filed herein, at pp. 69-104a).

The fundamental errors contained in that charge cannot be swept aside by either the District Court's own attempt to apologize for its admitted errors (App. B. pp. 63-64a), nor the argument of Respondent (Respondent's Brief p. 53) that "[f]laws can be found in almost any charge by separating certain paragraphs from the whole." Here, perusal of the charge will demonstrate that flaws were the rule rather than the exception.

A few examples may be noted. In a case where there was no evidence or contention of monopoly, the charge contained instructions with respect to monopoly (App. C. pp. 83a, 85a, 86a, 91a, 95a). In a complex case involving the interplay of the national labor policy and the national antitrust policy, the jury was instructed that it could decide the case based upon the *"atmosphere"* (emphasis supplied) of the case (App. C. pp. 76-77a) and also told to take a "common-sense approach to the case" (App. C. pp. 76-77a, 92a, 102a). The jury was also specifically instructed as follows:

> "You are to get an idea from the whole picture of this thing that this case should be decided one way

rather than another. Now, that is a common-sense approach to it." (App. C. p. 77a).

The District Court also charged the jury as follows (App. C. p. 92a):

> "I don't know whether I have given you the definition of a conspiracy or not. I have it here some place; anyway, I will give it to you. If I have to repeat it, I will ask your indulgence.
>
> "A conspiracy sounds like a legal term, a legalistic term. It is a common-sense, every-day word, as a matter of fact."

The instructions with respect to monopoly (App. C. pp. 83a, 85a, 86a, 91a, 95a), and the personalization of the Respondent company (App. C. pp. 81a, 101a), and the discussions with respect to eastern Kentucky (App. C. pp. 70a, 73a, 93a, 95a) all created an "atmosphere" prejudicial to the defendants in this case.

It is typical of the manner in which the case was permitted to be tried by the District Court and the manner in which the case was presented to the jury by the District Court in its charge, and the manner in which it was reviewed by the United States Court of Appeals for the Sixth Circuit, that the bulk of Respondent's Brief is devoted to a one-sided discussion of evidentiary details typical of a closing argument or a brief in opposition to a motion for judgment n.o.v.

Consol does not acquiesce in Respondent's argumentative and partisan alleged statement of facts. Although a detailed counter-statement of facts is not believed appropriate, Consol, as examples, does call attention to the fact that Respondent's statement that

Conclusion.

Consol organized and controlled the Bituminous Coal Operators Association (hereinafter "BCOA") is unsupported by the record. More significantly, however, is the unwarranted inference that the formation of a multi-employer bargaining group to comply with the policies of the relevant Federal labor statutes is to be considered as evidence of an intent to conspire to violate the antitrust laws. Also as an example, Consol takes issue with Respondent's statement (Respondent's Brief pp. 11-12) that UMWA has not approved a single change in a single contract with a single coal operator since 1950, when BCOA was formed. The uncontradicted evidence is that since 1890 UMWA had been seeking to achieve one uniform contract for the entire coal industry; that the regional differentials previously existing between the northern and southern coal operators were completely eliminated in 1943 as a result of the report of the War Mediation Board; and that all wage increases negotiated by UMWA since 1943 have been "across the board" regardless of the region in which the coal operator was engaged. (Jt. App. pp. 477, 486-87, 1166-67).

CONCLUSION

Consol's Petition for a Writ of Certiorari was based upon five reasons:

1. The Courts below created a new *per se* antitrust violation by ignoring the distinction between the forfeiture of the labor exemption from the antitrust laws and the violation of those laws.

2. The Courts below equated "having in mind" or having "conscious knowledge" that a legal collective bargaining agreement could harm a competitor with an

actual agreement constituting a *per se* violation of the antitrust laws.

3. The Courts below held that an admittedly legal collective bargaining agreement could be the foundation for an antitrust violation if it was entered into with an anticompetitive intent.

4. The Courts below erred with respect to the "clear proof" rule.

5. The District Court's handling of various matters, and its charge, merited the exercise of this Court's supervision.

Respondent's Brief in Opposition actually corroborates the first three reasons set forth in Consol's Petition and hereinabove in this Conclusion. The Brief in Opposition does not adequately answer reasons 4 and 5 at all.

Petitioner Consol respectfully reiterates its request that the District Court's charge be examined.

Petitioner Consol also respectfully reiterates its request that a Writ of Certiorari be granted.

Respectfully submitted,

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